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112-713

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 102.

MARIA W. MATTOON, *Appellant,*

vs.

JOHN S. McGREW, *et al.*

BRIEF OF S. S. HENKLE, COUNSEL FOR APPELLANT.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 102.

MARIA W. MATTOON, *Appellant,*

vs.

JOHN S. McGREW, et al.

BRIEF OF S. S. HENKLE, COUNSEL FOR APPELLANT.

STATEMENT OF THE CASE.

Original and amended bills were filed in the Supreme Court of the District of Columbia by the appellant, to which answers were filed by the defendants, McGrew and Douglas. The case was heard at Special Term upon bill and answer, and a decree dismissing the bill was entered. from which an appeal was taken to the General Term. That court found some fault with both the bill and the answer of McGrew, and leave was given the plaintiff to file an amended bill and to the defendant McGrew to file an amended answer, which amended pleadings were filed, and the case was heard thereon.

The decree of the Special Term, dismissing the bill, was affirmed; from which the plaintiff appealed to this court.

As the 2d amended bill and the amended answer of McGrew cover the whole case and took the place of the antecedent pleadings, counsel on both sides thought it unneccessary to encumber the record with the former pleadings, and hence the record commences with the 2d amended bill.

The substantial statements of the bill are: that the plaintiff is the wife of Calvin S. Mattern, to whom she married in 1844; that she is the owner in her own right in fee simple of all of lot No. 17 and a part of lot No. 7 in square No. 689, in the city of Washington; that no part of said real estate came to her by gift or conveyance from her husband, nor was it bought with his money, means or credit. It was purchased and entirely paid for by her own separate means, in which her husband had no interest whatever. The deeds conveying the property to her are dated in 1867 and 1868, and are set out in the record. In 1868 the plaintiff and her husband joined in a deed of trust upon lot 17 (which is the principal part of the premises) to Alexander Johnston to secure a loan of $2,000. The conveyance was in fee, with a condition that if the money was paid the property was to be re-conveyed, &c., Rec. 7-8. The money way paid and the property re-conveyed to the plaintiff alone on the 10th day of October, 1872, Rec. 9.

It is further alleged in the bill, that in 1873 the plaintiff discovered that the legal title to lot 17 was outstanding in the heirs of one Johnson Hellen, to whom it had been conveyed before she purchased it, to secure a loan made by a former owner of the property. The indebtedness had been paid, but the legal title had never been re-conveyed. Plaintiff filed her bill in the Supreme Court of the District of Columbia in 1873, against the heirs of Heilen to call in the legal title. On the 25th of June, 1874, a decree was passed vesting in the plaintiff the legal title. Rec. p. 6.

In 1874 and 1875 the plaintiff made two other deeds of trust upon said property. See pp 11 and 14, Rec.

That her husband is insolvent.

That the defendant McGrew recovered a judgment against her husband, November 4, 1875, and that he had caused an execution to be issued and levied by Frederick Douglas, the marshal of the District, upon all "the right title, claim and interest of the husband of the plaintiff in said premises, &c.

Prayer, that McGrew may be enjoined from further attempting to sell, or causing to be sold, for the payment of said judgment the pretended marital right or interest of her husband.

The answer of the defendant, McGrew, admits that the title to the real estate described in the bill was in the appellant, but says that " the deeds declare no trust nor equities in regard to said lands, but vest the title in the appellant free from any separate use, equity or trust" There are some other allegations of the answer not responsive to the bill, and not in any wise affecting the questions to be tried here. All other allegations of the bill are admitted.

ASSIGNMENT OF ERROR.

The court should have decreed a perpetual injunction, as prayed, instead of dismissing the bill.

ARGUMENT.

One of the questions made in this case is whether, under the "Married Woman's Act" for the District of Columbia, passed April 10, 1869, the interest or right which the husband had at common law to the rents and profits of his wife's real estate during life, can be levied upon and sold by a judgment creditor of the husband, to satisfy a debt which accrued after the statute, where the wife's title was acquired prior to the statute, but not by "gift or conveyance from her husband."

The act referred to is found in Secs. 727 and 728, Rev. Stats. of the United States relating to the District of Columbia and Post roads. p. 87.

"Sec. 727. In the District the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage, in any other way than by gift or conveyance from her husband, shall be as absolute as if she were unmarried, and shall not be subject to the disposal of her husband, nor be liable for his debts."

"Sec. 728. Any married woman may convey, devise and bequeath her property, or any interest therein, in the same manner and with like effect as if she were unmarried."

Whether the statute operated to *divest* the common law right of the husband in his wife's property acquired before the passage of the act, or not, is not the question.

Assuming that it does not divest the husband's interest, it does operate to take from him the right of disposal of his interest, in such a way, at all events, as to interfere with the enjoyment by his wife of her estate and also to protect it from liability for his debts.

As to property acquired by the wife before the act, although it may not *divest* the husband's right, it is in favor of the wife, a statute of *exemption*, and is just as effective for this purpose against creditors of the husband whose debts were contracted subsequently to the statute, as though the property were acquired after the passage of the act.

Pugh *v.* Ottenhimer, 6 Orogon, 231;
Brevard's Exr's.*v* Jones, 50Ala., at p. 239;
Horton *v.* McCall, 66 N. C.,159;
Ladd *v.* Adams. ibid, 164;
Hill *v.* Kesler, ibid, 437;
Smith *v.* Thompson, 2 McA, 291;
Van Wert *v.* Benedict, 1 Brad., N. Y.;
Tyler on Infancy and Coverture, 720;
Morse *v.* Gould, 1 Ker., 281;
Mason *v.* Haile, 12 Wheat., 370;
Sturges *v.* Crownshield, 4 Wheat. 122.

But this precise question was definitely settled by this court, at the last term, in the case of Hitz *v.* The National Metropolitan Bank, III U. S., 723; and it is perhaps of questionable propriety to cite other authorities

Although Mrs. Mattoon purchased this property in 1867 and 1868, and took deeds for it, she did not in fact get the legal title to lot No. 17 until 1874, when it was decreed to her by the equity court. Her legal title was was then acquired after the statute, and if Mattron had any interest in it prior to the decree, it was an interest in an equitable estate, and could only be reached by a proceeding in equity.

The decree of 1874 vested the title absolutely in Mrs. Mattoon, and being subsequent to the statute whatever interest or marital right Mattoon may have had in her equitable estate was divested by the decree.

Mattoon joined his wife in the deed of trust to Alexnder Johnston, bearing date January 10th, 1868 (Rec. 7) by which they conveyed "all the estate, right, title, interest and claim either at law or in equity, or otherwise however, of the parties of the first part," in and to lot No. 17, unto Johnston, with the usual condition for reconveyance upon the payment of the money secured, &c. On the 10th, day of October 1872, the money having been paid, Johnston re-conveyed lot No. 17 to Maria. W. Mattron *alone*, who accepted the conveyance with the consent and approval of her said husband, who never claimed or asserted any interest or right of any kind in the property described in the amended bill." Sec. 9.

This was all long before the appellee obtained his judgment.

If, therefore, her husband had a vested right in the property of his wife before the statute, he divested himself of all right, *title, interest and claim, either at law or in equity, or otherwise, however,*" by his conveyance to Johnston on the 10th day of January, 1868, and he never reacquired any interest, as the re-convenveyance was made with his approval and consent to his wife after the statute on the 10th of October, 1872.

In every conceivable aspect of the case the appellant is entitled to the decree which she sought in the court below.

S. S. HENKLE,
Counsel for Appellant.

112-713

IN THE

Supreme Court of the United States.

OCTOBER TERM 1884.

MARIA W. MATTOON *vs.* JOHN S. McGREW.	No. 102.

Appeal from the Supreme Court of the District of Columbia.

BRIEF FOR APPELLEE.

MOTION TO DISMISS.

The appellee moves to dismiss the appeal, on the ground that the matter in dispute does not exceed the value of $2,500.

The matter in dispute is the estate of Mr. Mattoon in his wife's property during the life of Mrs. Mattoon. He has no estate by the curtesy. The value of the estate in dispute does not appear in the record. The duty of showing the jurisdictional value is on the appellant.

Hagan *v.* Foison, 10 Pet., 160.

ARGUMENT ON THE MERITS.

There is no equity in the bill.

This contest is one between the alleged legal title of

Mrs. Mattoon and the legal title of the appellee, and there is nothing in the bill on which to found equitable relief. The complainant's remedy is trespass or ejectment.

The court of equity had no jurisdiction, and the dismissal of the bill was correct on that ground.

If the court below had jurisdiction, the question to be considered is the right of a husband in the wife's land, where the marriage took place and the land was acquired, before April 10th, 1869.

It is conceded that the essential facts in this case are like those in Hitz *v.* The National Metropolitan Bank, 111 U. S., 722; but a sense of professional duty to the appellee has led his counsel to submit, with the greatest respect to the court, certain considerations which may have been overlooked in the discussion of that case and may influence the decision of the present appeal.

Section 727 is as follows:

> "In the District, the right of any married woman to any property, personal or real, belonging to her at the time of marriage or acquired during marriage, in any other way than by gift or conveyance from her husband, shall be as absolute as if she were unmarried, and shall not be subject to the disposal of her husband, nor be liable for his debts."

Rev. Stats. relating to D. C., p. 87.

Two constructions of section 727 of the Revised Statutes for the District of Columbia may be suggested:

1st. The statute may be treated as operating solely to extinguish the rights of husbands in wives' property acquired after the date of the act.

This is the literal construction of the section: "The right of any married woman, &c., shall be as absolute as if she were unmarried." On this view, the clauses "and shall not be subject to the disposal of her husband," "nor be liable for his debts," are superfluous. The "absolute right" given by the preceding clause excludes the husband's power to dispose or the creditor's power to seize. But such redundancies are common, and the tendency of the lawgiver is to explain general provisions by the enumeration of particular instances.

2d. It is said that the statute may be construed as affecting two-fold objects:

I. As extinguishing the rights of husbands in wives' property acquired after the date of the act.

II. As exempting the rights of husbands acquired before the date of the act from seizure by their creditors.

The great objection to this latter construction is a grammatical one, viz., that different subjects must be attributed to the verbs in the same sentence coupled by the conjunction.

Grammatically, the right of any married woman," &c., is the subject of all the verbs, viz., "shall be absolute," "shall not be subject," "(shall) not be liable." Her rights in property acquired after the date of the statute "shall be absolute," "shall not be subject," "shall not be liable." In order to evolve from the statute the second purpose, a new subject must be interpolated between the first and the second clauses, viz., "the rights of the husband in wife's property acquired before the date of the act."

Another objection, not grammatical in its character, may be pointed out to this construction.

This construction holds that the husband rights in the wife's property acquired before the statute is not extinguished by the statute, but is exempted from seizure by creditors.

It is submitted that the enjoyment of property as against creditors is by the great weight of authority in England and America declared to be against public policy, and it is submitted that the construction of a statute should lean against the creation of such a state of things.

See Gray on Restraints on Alienation.

In the case of Hitz *v.* The Bank, and in the present case, the interest of the husband sought to be seized is the "*jus mariti*"—the husband's right to the profits of the land during the wife's life. Such an exemption as a matter of legislation may not be unreasonable. But the construction contended for covers "curtesy," the estate of the husband after the death of the wife. The following case may be supposed, viz.: A marriage, followed by the birth of a child capable of inheriting, the death of the child, and the death of the wife. In such a case the husband would have the lands for his life, and defy his creditors. A result like this is surely against public policy.

For these reasons, it is submitted that the first of the suggested constructions is correct on principle. It is further submitted that that construction is sustained by the great weight of authority in this country, and the attention of the court is asked to the other brief filed herein on that point.

James Lowndes,
Attorney for Appellee.

112-713

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1884.

MARIA W. MATTOON, *Appellant*,

vs.

JOHN S. McGREW, *Appellee*.

Brief for Appellee.

LEIGH ROBINSON,
Of Counsel for Appellee.

WASHINGTON, D. C.:
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1884.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM—1884.

MARIA W. MATTOON, *Appellant*, *vs.* JOHN S. MCGREW, *Appellee.*	No. 102.

Brief for Appellee.

The only question in this case, which admits of argument is, whether the interest acquired by a husband in the realty of his wife, prior to April 10th, 1869, falls within the scope of the expression, "*the right of any married woman*," so as to be exempt from execution, under the married women's act, for the District of Columbia.

"Upon marriage, the husband becomes entitled to a freehold in his own right in the real estate of his wife." *Clark's Appeal*, 79 Pa. St., 376; *Bartlett* vs. *Cowles*, 15 Gray, 446. "It is a subject upon which a devise of the wife cannot operate." 79 Pa. St., 376 On the birth of issue he becomes tenant by the curtesy initiate. He may pass, *by his own conveyance alone*, his interest as tenant by the marital right, or tenant by the curtesy, in his wife's land. *Trask* vs. *Patterson*, 29 Me., 499; *Butterfield* vs. *Beall*, 3 Ind., 203, 6;

Shortell vs. *Hinkley*, 31 Ill., 219; *Coleman* vs. *Satterfield*, 2 Head, 259. He may dispose of it, according to his pleasure, *without or against, the consent of his wife*. *Babb* vs. *Perley*, 1 Me., 8. It may be taken by his creditors on execution against him alone. *McClain* vs. *Gregg*, 2 A. K. Mar., 454; *Cheek* vs. *Waldrum*, 25 Ala., 152. In short the estate by the curtesy initiate is as completely the husband's as if his wife before the marriage had owned and conveyed it to him for a valuable consideration. *Rose* vs. *Sanderson*, 38 Ill., 249. It is a vested legal estate, *distinct from that of the wife*, and is liable to all the incidents of any other freehold or life estate. *Nichols* vs. *O'Neil*, 2 Stock., 88; *Bank* vs. *Williams*, 17 Pick., 438; *Kisby* vs. *Tead*, 13 Met., 149; *Schermerhorn* vs. *Miller*, 2 Cow., 439; *Vanduzer* vs. *Vanduzer*, 6 Paige, 370; *Billings* vs. *Baker*, 28 Barb., 368. It becomes immediately liable for the debts of the husband, and he cannot, by any refusal to take the property, defeat the claims of his creditors. *Watson* vs. *Watson*, 13 Conn., 83; *Proctor* vs. *Newhall*, 17 Mass., 81; *Bennett* vs. *Child*, 19 Wis., 387; *Hyde* vs. *Barney*, 17 Vt., 81. Its value is the complement of the value of the fee, after deducting the value of the remainder, the elements of computing which are entirely within reach of the appraisers. *Canby* vs. *Porter*, 12 Ohio, 79. A judgment against the husband of an heiress at law is a lien against his life estate, and the judgment creditor is entitled to be paid the amount of his judgment, when the proceeds due and payable to such husband are sufficient for that purpose. *Beard* vs. *Dietz*, 1 Watts, 309. "*As then*," said Gibson, C. J., "*the defendant had an independent estate in his wife's land, which might have been aliened by his separate act, it was bound as an inchoate one by the judgment against him, for his separate debt.*" *Bank* vs. *Stauffer*, 10 Pa. St., 398 (May Term, 1849). So the interest of a husband in his wife's distributive share of an intestate estate is subject to be attached in the hands of the administrator, by the trustee process, at the suit of a creditor of the husband. *Wheeler* vs. *Bowen*, 20 Pick., 563. The husband is deemed a purchaser thereof for a valuable consideration. *Howes* vs. *Bigelow*, 13 Mass., 390. The conveyance by a wife, on the day of her marriage, of her real estate, is held to be a fraud on her husband's marital rights. *Robinson* vs. *Buck*, 71 Pa. St., 386; *Westerman* vs. *Westerman*, 25 Ohio St., 500; *Baker* vs. *Jordan*, 73 N. C., 145.

"It is the general rule," say the books, "that no statute is to have a retrospect beyond the time of its commencement, for the rule and law of Parliament is that *nova constitutio futuris formam debet imponere non praeteritis*, and not only is it the doctrine of the English law that a statute is not to have a retroactive effect, but it is also founded on the principles of general jurisprudence." Dwar, 540, *Plumb* vs. *Sawyer*, 21 Conn., 351; *Blanchard* vs. *Sprague*, 2 Story, 171; Id., 3 Sumner, 535; *In the Matter of Wm. Billing*, 3 Benedict, 214; *Harvey* vs. *Tyler*, 2 Wall., 347. This rule has been applied to acts readily admitting of the opposite construction. *Warren Manufacturing Co.* vs. *Etna Insurance Co.*, 2 Paine, 517. *Kidd* vs. *Montague*, 19 Ala., 625. "The essence of a new law is a rule for future cases." Kent C. J., in *Dash* vs. *Van Kleeck*, 7 John 4 & 5. Therefore, in interpreting its own acts, a legislature cannot declare what the law *was*, but only what it *shall be*. *Ogden* vs. *Blackledge*, 2 Cr., 272.

The rule becomes inexorable when such a statute would impair a vested right. Thus an act allowing to tenants the value of improvements, &c., on recoveries against them, so far as it applies to past improvements, is unconstitutional. *Society* vs. *Wheeler*, 2 Gall., 105; *Wilson* vs. *R. W. S. District*, 22 Minn., 488; *Nelson* vs. *Allen*, 1 Yerg., 360; *Brown* vs. *Storm*, 4 Vt. 37. A statute authorizing a forfeiture of dower or curtesy, "whenever a married man shall be deserted by his wife, or a married woman by her husband for the space of one year" should be construed as prospective only. It applies only to cases of desertion beginning after the statute takes effect, *Giles* vs. *Giles*, 22 Minn., 348. Under an Iowa statute of 1839, as at common law, the widow is entitled during her natural life to one-third, &c. The code provides that the widow's dower shall be one-third of her husband's real estate in fee simple. "Courts," said the Iowa Judges, "favor dower, but this rule should not be carried so far as to impair vested rights, by giving a statute a retrospective operation. * * We cannot," they said, "with all our predilection for them, (widows) trample vested rights under our feet." *Davis* vs. *O'Ferrall*, 4 Iowa, 168–171. A law which by its own inherent force extinguishes rights of property, or compels their extinction without any legal proceedings whatever, comes directly in conflict with the Constitution. *Baker* vs. *Kelly*, 11 Minn., 376. "It is against common right as well as against magna charta." *Bowman* vs. *Middleton*, 1 Bay, 252. As was said by Gibson, C. J., in *Norman* vs. *Heist*, "The right of property has no foundation or security but the law, and when the legislature shall successfully attempt to overturn it, even in a single instance, the liberty of the citizen is no more." 5 W. & S., 193. *Taylor* vs. *Porter*, 4 Hill, 145; *Howard* vs. *Moot*, 64 N. Y., 262; *Wynehamer* vs. *People*, 13 N. Y., 393; *Foster* vs. *Essex Bank*, 16 Mass., 271; *Calder* vs. *Bull*, 3 Dallas, 388; *Couch* vs. *Jeffries*, 4 Burr, 24–62; 1 Bla., Conn. 46.

Is then the protection afforded to the "right of any married woman," by the statute, sufficient to exempt the interest referred to in the first paragraph of this brief? The title of the statute under which this claim is made, was and is, "*an act regulating the rights of property of married women in the District of Columbia.*" On its face, then, it did not purport to be an act regulating the rights of property of married men in the District of Columbia. The title of an act may be referred to in cases of doubt to ascertain the purpose of the legislature. *Cohen* vs. *Barret*, 5 Cal., 209. We know that according to our mode of legislation, the title is prefixed by the legislature, and is intended to designate the subject of the act *State* vs. *Stephenson*, 2 Bailey, 336; and may therefore be resorted to to aid the interpretation even of a penal statute, id. 234. We may therefore consider it as explanatory of the true state of the law. *Burgett* vs. *Burgett*, 1 Ohio, 481; *Matter of Boston, &c.*, 51 Cal., 624; *Bradford* vs. *Jones*, 1 Md., 251; *Nazro* vs. *Merchants, &c.*, 14 Wis., 295.

The regulation was this:

> " *That in the District of Columbia the right of any married woman to any property, personal or real belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were femme sole, and shall not be subject to the disposal of her husband, nor be liable for his debts; but such married woman may convey, devise, and bequeath the same, or any interest therein, in the same manner and with like effect as if she were unmarried.*
>
> "§2. " *And be it further enacted, that any married woman may contract and sue and be sued in her own name, in all matters having relation to her sole and separate property in the same manner as if she were unmarried; but neither her husband nor his property shall be bound by any such contract, nor liable for any recovery againt her in any such suit, but judgment may be enforced by execution against her sole and separate estate in the same manner as if she were sole.*" 16 Stat., 45.

The whole of this act was retained in the Revised Statutes, being there distributed into four sections instead of two. (p. 87.) We start then with the principle that the rights of husband and wife to property acquired before the passage of any act providing for the separate or common property of husband and wife, are governed by the rules of the common law. *Darrenberger* vs. *Haupt*, 10 Neb., 43; Schouler, Husband and Wife, § 211.

Under this statute, what is it which shall not be liable to the debts of the husband? Clearly, "the right of any married woman." This is the subject of the sentence.—Non liability for the debts of the husband is the predicate—that which is affirmed of the subject.

What is the right of a married woman in her husband's curtesy? No right whatever. On the contrary, the husband's interest is a vested freehold estate, distinct from that of the wife; so distinct that he may convey it without or against her consent.

What are the other affirmations of the subject, this "right of any married woman," which shall not be liable for her husband's debts? It is a right, which "shall be as absolute as if she were femme sole, and shall not be subject to the disposal of her husband." Does an estate, which is the husband's, "as completely as if his wife before the marriage had owned and conveyed it to him for a valuable consideration," which he may convey without or against her consent come within this category? If the right "to any property personal or real," which shall be as absolutely the wife's as if she were femme sole, could not exist until after the passage of the act, then the exemption is equally postponed, and can only take effect when there shall be "property personal or real," to which the married woman's right is absolute. The plain import of the language is the exemption of the right of one person for the debt of another, of the wife's right for the husband's debt, not of the husband's right for the husband's debt. The qualification of the property to be exempt is that it shall be as absolutely the wife's as if she were *femme sole.*

But this phrase, "nor be liable for his debts," is explained not only by what precedes it, but by what succeeds it. This right of a married woman not only shall not be liable for the debts of her husband, "but such married woman may convey, devise, and bequeath *the same, or any interest therein*, in the same manner, and with like effect as if she were unmarried." *Ex antecedentibus et consequentibus fit optima interpretatio*. Here sequent and antecedent clauses combine to conclude the question. The right which is exempt from liability for the debts of the husband is identical with the right which is exempt from the control of the husband; "the same" which is subject to the control of the wife, so that she may convey, devise, and bequeath it, or any interest therein," in the same manner and with like effect as if she were unmarried." If "general words may be limited by the relative word" such "to a particular description of thing contained in a preceding section." Dwar, 601; *Rex* vs. *Gwenop*, 3 T. R., 135; *Bennett* vs. *Daniel*, 10 B. & C., 500; *Morris* vs. *Meller*, 6 id., 448; surely specific words should be restricted by the expression "the same" to the particular description contained in the identical section. The clause of exemption is governed and explained by the conjoined words and clauses, so that we may say, *noscitur a socio*, the right which is exempt by the right which is made absolute. How then can a statute which exempts what is exclusively the wife's right be judicially metamorphosed into the exemption of what is exclusively the husband's right? Nothing can be plainer than that the interest upon which the 2d section operates is that which, by virtue of the statute, is made the "sole and separate property" of the wife, in respect to which she only "may contract, sue, and be sued." But if under the category of "the right of any married woman," an existing interest of the husband is included in one of the clauses of this act, it is equally included in every other.

If, without special description or indication, a single clause of five words relates to such an interest, then all the clauses and all the words do; the clauses which subject it to the wife's debts equally with those which exempt it from the husband's. The language which exempts is the language which subjects. The estate which is exempt from the husband's debts is the estate which is subject to the wife's debts. The test of exemption from the husband's debts is non-exemption from and subjection to the wife's.

In substantial accord with the views here expressed, this court, at October Term, 1873, in construing this very act, says, that there by it is enacted, in substance, "*that the right of a married woman to any property belonging to her at the time of marriage, or acquired during marriage, in any other way than by gift or conveyance from her husband, shall be as absolute as if she were feme sole, and not subject to the disposal of her husband or liable for his debts; and she may convey or bequeath the same as if she were unmarried. Also, that any married woman may contract and sue and be sued in her own name in all matters having relation to her sole and separate property in the same manner as if she were unmarried.*" "*We think it clear,*" *said the court,* "*that it (the statute) does not refer to her contingent interest in her husband's estate, but to property owned by or coming to her independent of her husband—property which, but for the statute, he would acquire an interest in by right of marriage. The sole object of the statute was to prevent his acquiring such interest in her property. Sykes* vs. *Chadwick*, 18 Wall., 145. It "the *sole* object of the statute was to prevent his acquiring such interest in her property," how can it be, at the same time, the object to displace or vary the incidents of an estate already acquired, and which, of course, cannot be prevented. Dower is the wife's right as distinctly as curtesy is not. In his dissenting opinion in this case, Miller, J., says: "*The District of Columbia, for which that court sits and whose laws it administers, has preserved the principles of the common law less affected by statutes than any part of America, and, perhaps, less than England herself.*

* * *I agree to the definition of the court as to what is separate property within the meaning of that act.*" *He concludes his dissent from the particular point decided by saying,* "*I do not think the courts have an unlimited right to overturn the clearest principles of the common law, because legislation has lagged behind the progress of the age in the jurisprudence which governs the rights of married women. I regret to have to dissent, but I think the precedent of making laws in this manner too pernicious to be acquiesced in by silence.*" 18 Wall., 150. What was "separate property within the meaning of that act," was then agreed upon by every member of this bench." It was and is "property which but for the statute, he, (the husband) would acquire an interest in by right of marriage." Property, which, notwithstanding the statute, and beyond the power of the statute to prevent, he has acquired an interest in by right of marrige, is, plainly, not included in this description. It is respectfully reiterated that unless "courts have an unlimited right to overturn the clearest principles of the common law, because legislation has lagged behind the progress of the age in the jurisprudence which governs the rights of married women," in a District which has preserved the principles of that law, "less affected by statutes than any part of America, and perhaps less than England herself," the construction claimed by the appellant for the act of April 10th, 1869, cannot be sustained.

It is the rule that a statute affecting rights and liabilities should not be so construed as to act upon those already existing. *Johnson* vs. *Burrell*, 2 Hill, 238. *In Re Episcopal Church*, 58 Barb., 194. It issubmitted that, under this statute, the liabilities of the husband are not affected unless his rights are affected. Under it, right and liability continue to be reciprocal. Whatever right is not liable for the husband's debts is liable for the wife's. Her liability begins where his ends.

It is speaking within bounds to say that no Appellate Court of any one of the United States, and no United States District or Circuit Court, has ever construed a statute like the one under review, or equivalent thereto, to be the exemption of an interest, admitted to be in the husband, from liability for his debts. Thus, in refutation of the statement just made, some reliance has been placed upon the case of *White* vs. *Hildreth*, which arose under the following statute of Vermont: (Compiled Statutes, p. 403) "*The rents, issues, and profits of the real estate of any married woman, and the interest of her husband in her right in any real estate, which belonged to her before marriage, or which she may have acquired by gift, grant, devise, or inheritance during coverture, shall, during coverture, be exempt from attachment or levy for the sole debts of the husband.*" In the nature of things, a statute which *expressly exempts the interest of the husband* should receive a different construction from one which does nothing of the kind. The Vermont act declares that *the interest of her husband* in any married woman's right in any real estate, shall be exempt. Our act has no such language. It is not disputed that this may be done by legislation, but it must be done explicitly, and the statute being in derogation of common law will be strictly construed, and not extended by implication.

In 1859, under this statute, which expressly exempts the husband's interest, it was held that the precise interest described, of course, was not liable. Such is the case of *White* vs. *Hildreth*, 32 Vt., 266. The Vermont law is not in correspondence but in contrariety to that for this District.

In 1859, the Supreme Court of Indiana, used these words: "The counsel say, that nowhere do they find any law authorizing the selling of the wife's interest in land for the debts of her husband." But the court replied: "No interest of the wife is sold, for the entire estate in the lands by the marriage vested in the husband during their joint lives. *During their joint lives she has no estate in the lands.*" *Montgomery* vs. *Tate*, 12 Ind., 616; S. P. *Buchanan* vs. *Lee*, 69 Ind., 117.

A STATUTE LIKE THE ONE FOR THIS DISTRICT APPLIES ONLY TO PROPERTY ACQUIRED AFTER IT TAKES EFFECT.

The difference between the Vermont Act of 1847, and the one in force in this District, is fairly presented in the case of *Rose* vs. *Sanderson*. In this case the attachment, upon which judgment was rendered against the husband, was levied May 10th, 1861. The act (of April 21st, 1861), is: "*That all property, both real and personal, belonging, &c., or which any married woman during coverture acquires in good faith, from any person other than her husband, by descent, devise, or otherwise, together with all the rents, issues, increase and profits thereof, shall, notwithstanding her marriage, be and remain, during coverture, her sole and separate property, under her sole control, and be held, owned, possessed and enjoyed by her, the same as though she were sole and unmarried; and shall not be subject to the disposal, control or interference of her husband, and shall be exempt from execution or attachment for the debts of her husband.*" Here we have the magical words, which, in the case at bar, are supposed to work the exemption of the husband's interest; and it was argued that the construction of the Vermont act should govern that of Illinois. "But," replied the court, "that act in terms exempted from execution for the debts of the husband 'the rents, issues and profits of the real estate of any married woman, *and the interest of her husband in her right in any real estate* which,' &c. When our legislature *makes a similar exemption*, the case will be in point, *but it has not done so in the act under consideration. Unlike the Vermont law, our act does not seek to exempt from execution the existing interest of the husband.*" 38 Ill., 251.

In the case of *Hitz* vs. *Metropolitan Bank*, 111 U. S., 722, it was said of this opinion, "it is apparent from the record that the debt, for which the writ of attachment was levied, existed when the Statute of Exemption was passed," and it is suggested that this explains the result. But, in point of fact, so little stress is laid on this date, that it is not "apparent" when the debt accrued. The priority of the debt to the statute can only be an inference from the short time which elapsed between the passage of the act and the commencement of litigation. The court did not halt because there was not case enough before it, but because there was not law enough behind it. It did not say that "the debt existed when the Statute of Exemption was passed," but that no statute exempting the husband's interest had been passed. It was not the record but the Legislature which rendered the argument irrelevant. The identical language may be applied to the statute under review. "Unlike the Vermont law, our act does not *seek to exempt the existing interest of the husband.*"

If any doubt be still entertained as to the import of this decision, it must surely be removed by the reiterations of the same tribuual, coming down to the present time. *Farrel* vs. *Patterson*, 43 Ill., 53; *Cole* vs. *Van Ripper*, 44 Id., 64; *McCarty* vs. *McCarter*, 49 Id., 87. *Jussoy* vs. *Delius*, 65 Id., 469; *Davenport* vs. *Karnes*, 70 Id., 467.

In 1881, in a case, where we must believe that the debt accrued after May 10th, 1861, the basis of the bill before the court, being a judgment of October, 1878, it was held: "*If a woman being seized of real estate married and a child was born of the marriage before the married woman's act of 1861 took effect, the husband will have an estate in her lands for his life; but if the child was born after such law took effect, he will have an estate during coverture, and in either case his estate may be sold on execution.*" *Lang* vs. *Hitchcock*, 99 Id., 550. This decision, twenty years after the passage of the Illinois act, must settle its construction.

A Pennsylvania act of April 11th, 1848, provides: "*That every species and description of property, &c., which may belong to any single woman, shall continue, &c., and all such property of every kind, which shall accrue to any married woman during coverture, &c., shall be owned, &c., as her own separate property; and the said property, whether owned by her before marriage, or which shall accrue to her afterwards, shall not be subject to levy and execution for the debts or liabilities of her husband.*" Laws of 1848, p. 536.

One of the first questions under this was whether personal property derived from the wife would go to the personal representatives of the husband, as to which the court said: "A careful reading of it (the act) indicates clearly that the language and terms used make it prospective in its operation, entirely, if not as to the marriage, *it clearly is with regard to the time the woman acquires the property.* Any other construction would seem to be a direct violation of the bill of rights." *Housel* vs. *Housel*, 4 Clark, 387. Thus it will be seen that the first doubt about such an act is not whether it is postponed to future acquisitions, but to future marriages. The view taken in 4 Clark, 387, corresponds with what was afterwards said by Gibson C. J., *Snyder* vs. *Ball*, 17 Pa. St., 58; and by Black C. J., *Burson's Appeal*, 22 Id., 167. Therefore, in 1853, it was said: "The married woman's act of 1848 was not intended to take away the vested rights of the husband, and does not allow him to give them away in fraud of his creditors." *Stehman* vs. *Huber*, 21 Pa. St., 260. "To bring the property of a married woman under its protection, it is made necessary by the letter as well as the spirit of the statute to *prove that she owns it.* *Keeney* vs. *Good*, Id., 355. Therefore, the interest of a widow in the lands of her deceased husband, upon her second marriage, prior to the act of 1848, vested in the second husband, *and was held liable for his debts*, Lowrie, J., saying: "If the marriage took place before the act of 1848, the estate of the husband became vested by the marriage, and that act was not intended to divest it. Morality and the constitution forbid such intention." *Bachman* vs. *Chrisman*, 23 Id., 162. This opinion was reaffirmed in 1865. *Mann's Appeal*, 50 Id., 376. See, also, *Boose's Appeal*, 18 Id., 392. From these decisions, it is plain that the act of 1848 could not constitutionally exempt the existing interest of the husband, because it could not constitutionally divest it.

In 1850, there was legislation, exempting from execution for any debt of the husband, any interest he might have as tenant by the Curtesy So soon as the influence of this act could be felt, it was said: "Since the act of April 22d, 1850, even *the curtesy of the husband in her (the wife's) estate is* exempt from levy and sale during the wife's life time," *Curry* vs. *Botts*, 53 Id., 403,—a very plain acknowledgment that it was not previously. Further, the act of 1848, was modified by that of 1850, only in respect of realty. Hence, in 1860, where a married woman claimed personal property in opposition to her husband's creditors, it was said by LOWRIE, C. J: "It is not enough to show that she received money from her father *before the passage of the act of 1848*, for that became the husband's property by virtue of the marriage relation." *Walker* vs. *Reamy*, 36 Id., 410; *S. P. Gicker* vs. *Martin*, 50 Pa. St.

These cases prove, with mathematical certainty, that under the act of 1848, real and personal estate which a husband, at the time of the act, had acquired by marriage, would not be exempt from liability for his debts; and that to create such exemption a new and different act must be passed.

The history of kindred enactments in Ohio is a demonstration of the same thing. In Ohio, it was enacted, Feb. 28th, 1846, "that *the interest of any married man in the real estate of his wife belonging to her at the time of their intermarriage, or which may have come to her by devise, gift or* *inheritance during coverture, or which may have been purchased with her sole and separate money, &c., shall not be liable to be taken by any process of law or chancery, for the payment of his debts.*" By § 3d, *no interest of the husband in any chose in action, demand, &c., of his wife shall be taken for his debts, unless he shall have reduced the same to possession, with a proviso, excepting debts contracted at the passage of the act.* 44 Ohio, L., 75. This is the Vermont original. Nevertheless, on Feb. 5th, 1847, for the purpose of "guarding against an improper construction of the law passed Feb. 28th, 1846, it was further enacted, "*that the act, &c., shall not be so construed, as to make any interest of a husband in the property of the wife, coming within the meaning of said act, liable to be taken by any process, &c., for the payment of the debts of the husband, during the life of the wife, or the life or lives of the heir or heirs of her body, which said property shall have been acquired in any way contemplated by said act, subsequent to the taking effect of the same, anything in the proviso annexed to the contrary notwithstanding.*" 45 Ohio L. p. 23. From this, it is obvious that notwithstanding the explicit terms employed, it was apprehended that the operation of the act might be postponed to future marriages, and that an additional act was deemed essential, to secure the application of the first to an interest in land of the wife, acquired after the passage of the act, by a husband married at the time of it. It will be observed that as to personal property, the husband retained his common law right to reduce the same to possession, and that if he did so, by implication, the common law consequence attached. On April 3d, 1861, it was enacted (to take effect May 1st, 1861), "*any personal property including rights in action, belonging to any woman at her marriage, or which may have come to her during coverture, by gift, bequest, or inheritance, or by purchase with her separate money, or means, or be due as the wages of her separate labor, or have grown out of any violation of her personal* *rights shall, together with all income, increase, and profits thereof, be and remain her separate property, and under her sole control, and shall not be liable to be taken by any process of law for the debts of her husband.*" Sayler's statutes, p. 63. But in 1868, in a case where a wife replevied goods (which had been levied on July 8th, 1864,) claiming to hold them exempt from sale to pay her husband's debts, it was held that a statute enlarging the rights of married women cannot constitutionally be applied to a case in which the marriage was solemnized *and the property acquired before the passage of the act.* *Quigley* vs. *Graham*, 18 Ohio, St., 45

The act of 1846 expressly exempted the husband's interest, so far as that act extended. The act of 1861, as plainly exempted the wife's. It was not "constitutionally competent" to exempt the husband's interest under the phraseology of the latter act, because this could not be accomplished without including the husband's interest, under the denomination of the wife's. The two interests not being the same but diverse, this cannot be done, unless the power exists to transmute, by implication, the husband's interest into the wife's. It is this last which the legislature is not "constitutionally competent" to do. It is indispensable to expressly exempt the interest of a husband in order to accomplish that object. "The effect of the statute (April 3rd, 1861), seems to be to impress upon the property therein referred to, of married women, and which, without the aid of the statute, would not have been their separate property, that legal character." *Glidden* vs. *Taylor*, 16 Ohio St., 518. This is in substance the opinion of this court in 18 Wall., 145. S. P. *Levi* vs. *Earl*, 30 Ohio St., 168.

In New Jersey, on an assignment by an insolvent of his property for the benefit of his creditors, Nov. 20th, 1862, the question is thus submitted: "How far," says the court, "is this matter affected by the act of 1852?" Nix. Dig., 503, §. 2. This provides that the real and personal property, and the rents, issues and profits thereof, of any female now married, shall not be subject to the disposal of her husband, but shall be her sole and separate property, as if she were a single female, except so far as the same may be liable for the debts of her husband heretofore contracted by any legal lien. *But it will be observed that this statute does not profess to affect the estate of the husband in the lands, but only the estate of the wife. The estate of the wife in the lands was not a present estate, but one subject to the estate of the husband, conveyed to him by the ceremony of marriage. Her estate was what remained after his death, and that was by the statute in terms protected*, *Prall* vs. *Smith*, 31 N. J. L., 246. In conformity with this, it was held in 1874, that judgments recovered in 1857 and 1858, against a husband, married before the act of 1852, were liens on his interest in the real estate of his wife acquired before that act. *Dayton* vs. *Dusenbury*, 25 N. J. Eq., 110.

In Rhode Island, it was enacted in 1844, "*The real estate, chattels real, household furniture, plate, jewels, stock, &c., which are the property of any married woman before marriage, or which may become the property of any woman after marriage, shall be and hereby are so far secured to her sole and separate use, that the same, and the rents, profits and income thereof, shall not be liable to be attached or in any way taken for the debts of the husband, either before or after his death.*" Public Laws, p. 270.

This is really a statute of exemption, but this exemption is conferred on that which, by virtue of the statute, is made the separate property of the wife. In 1859, an action of ejectment to recover *the interest of a husband in the real estate of his wife, sold under a decree against him*, was brought by the purchaser at said sale. The deed, executed by the master of the court in pursuance of the decree, bore date October 17th, 1857, or 13 years after the statute; so that it is reasonable to infer that the indebtedness of the husband accrued within that period. The court said: "The purpose of this act, undoubtedly was, as is apparent upon its face, to secure to the wife the receipt of the rents, issues, profits and income of *her* estate. It was, however, no purpose of the act to protect the husband against *his* creditors," and the plaintiff in ejectment was held entitled to recover. *Martin* vs. *Goff*, 6 R. I., 92.

In Maine, an act of March 22d, 1844, as amended August 27, 1847, reads: "*Any married woman may become seized or possessed of any property, real or personal, by direct bequest, demise, gift, purchase or distribution, in her own name, and as of her own property, exempt from the debts or contracts of her husband*," and by § 3, "*the provisions of said act as hereby amended shall apply to all married women, whether married before or after the passage thereof*." Laws of 1847, p. 22. R. and C., his wife were married in the summer of 1842. In October, 1842, W. K., conveyed to R's wife, land "upon which, April 30th, 1855, the demandant duly levied his execution against R., as his estate." The court said: "*When W. K., conveyed the land to the wife, her husband acquired therein a life estate.* * * *It was liable to be taken in execution for his debts. Litchfield* v. *Cudworth, 15 Pick., 23. The life estate was the husband's freehold. The inheritance belonged to the wife; such was the law when C. R., received her deed from W. K., and her husband's rights therein were perfected simultaneously with hers, and these rights are not affected by the statute.* * * *The demandant shows title by his levy to the husband's life estate. The wife did not hold it; she was not seized and possessed of her husband's life estate, his freehold of which he was seized*." Held, "*the husband has a life estate in the real property of the wife acquired prior to the statute, which may be taken in execution for his debts. Beall* vs. *Knowles*, 45 Me., 479; S. P. *Hamlin* vs. *Jones*, 20 Wis., 567; *Howe* vs. *Colby*, 19 Id., 584; *Bennet* vs. *Child*, 19 Id., 387; *Bouknight* vs. *Epting*, 11 S. C., 74;

Aultman vs. *Obermayer*, the purport of which is, property derived from the wife, but reduced to the possession of the husband, in 1870, can not be exempted from his debts by an act of 1871, making the real and personal property of a married woman her separate estate, free from the disposal and the debts of her husband. 6 Neb., 260; *Dyer* vs. *Arnold* 37 Ark., 17; *Shyrock* vs. *Cannon*, 39 Id., 434; *O'Connor* vs. *Harris*, 81 N. C., 282.

The New York act of April 7th, 1848, (laws of 1848, p. 307) by (§ 1) makes the real and personal property of any woman who may thereafter marry, her separate property exempt from the debts of her husband. § 2. "*The real and personal property, and the rents, issues, and profits thereof of any female now married, shall not be subject to the disposal of her husband, but shall be her sole and separate property as if she were a single female, except so far as the same may be liable for the debts of her husband* heretofore contracted." § 3. "*It shall be lawful for any married female to receive by gift, grant, devise or bequest from any person other than her husband, and hold to her separate use, as if she were a single female real and personal property, and the rents, issues, and profits thereof, and the same shall not be subject to the disposal of her husband, nor be liable for his debts.*"

There can be no doubt that this legislation of 1848 contains every exemption which is in force in this District, but it was held "to apply only to property acquired after it took effect." *Perkins* vs. *Cottrell*, 15 Barb., 446. Therefore where an estate was conveyed in 1842 to a married woman, who claimed to have had, ever afterwards, the entire and exclusive control thereof, the interest of her husband therein was held to be subject to execution, for an indebtedness contracted by him, in May, 1848, after the act for the more effectual protection of married women went into effect. Id., S. P., *Smith* vs. *Colvin*, 47 Id., 161. This doctrine in respect to the husband's interest in realty derived from the wife, does not appear to have been controverted afterwards. The debate in New York arose over two questions; first, whether a surviving husband was divested by the statute of his curtesy in land, undisposed of by the wife at her death; and secondly, whether a chose in action of the wife, not reduced to the possession of the husband at the time of the enactment, could, by reduction afterwards, become vested in him, and, as a consequence, be made liable for his debts. Both questions were answered in the affirmative; the first in *Hatfield* vs. *Sneden*, 54 N. Y., 277; *Barnes* vs. *Underwood*, 47 Id., 351. As to the second, the claim was that prior to the reduction into the husband's possession, such an interest fell within the definition of the personal property of a married female, which the statute says shall be hers "as if she were a single female, except so far as the same may be liable for the debts of her husband heretofore contracted." But the court said: "By the law as it then stood, the husband was entitled to reduce the legacy to possession, and use it as his own property. The question then arises, whether the legislature can divest him of this right and give the property to the plaintiff. I think the act in question cannot affect the rights of these parties." *Holmes* vs. *Holmes*, 4 Barb., 300. Such an act if intended "*to affect existing rights of property in married persons is unconstitutional and void.*" Id., 296; *Ryder* vs. *Hulse*, 24 N. Y., 375.

In accordance with the logic of all the cases heretofore cited, it was held in 1864, in a case where judgments were recovered against a husband upon notes issued in October, and November 1861 (*i.e.* thirteen years after the act), that the act "did not and could not take away the right of a husband married in 1847, in his wife's personal property, and therefore that the same might lawfully be levied on by his creditors upon execution." *Savage* vs. *O'Neil*, 42 Barb., 374. In still another case, where part of a husband's interest (not reduced to possession until after the act) had vested in right prior to the act, the wife was not allowed to claim the same as against the husband's creditors. *Briggs* vs. *Mitchell*, 60 id., 288. It is believed to be entirely accurate to say that no decision can be found, in this State, which holds that the interest of a husband, in real or personal estate, acquired by marriage prior to the law, was freed by the statute from liability for his debts.

These decisions have been followed in other States; in Massachusetts, *Alexander* vs. *Crittenden*, 4 Allen, 342; *Coombs* vs. *Read*, 16 Gray, 271; in Alabama, *Kidd* vs. *Montague*, 19 Ala., 619; *Manning* vs. *Manning*, 24 Id., 346; in Georgia, *Sperry* vs. *Haslam*, 57 Ga., 414. In Alabama, by act of March 1st, 1848, "*All property of the wife held by her previous to the marriage, or which she may become entitled to after the marriage, in any manner, is the separate estate of the wife, and is not subject to the payment of the debts of the husband.*" 2 Brick Dig., 90. But when the right of the husband accruing before the act became absolute by reduction after the act, the same was liable for his debts. *Stearns* vs. *Weathers*, 30 Ala., 713; *Anderson* vs. *Anderson*, 37 Id., 683. In Kentucky it was enacted, Sec. 3, "That the lands of no married woman within the commonwealth, which she may have owned at the time of her marriage, or which may come, or be given, devised, or descend to her during the marriage shall be subject to the debts of the husband;" and by Sec. 1, "That the slave or slaves of a married woman shall hereafter within this commonwealth be held and taken to be real estate, in so far that no slave or slaves which any such married woman may have at the time of her marriage, or which may come, descend, or be devised to her during her coverture shall be liable to the debts of her husband." Laws of 1846, pp. 42, 43. But in 1850, "A vested remainder in slaves, which vested prior to the act of February 23d, 1846, entitled, &c., but which did not come to the possession of the *feme* until after that date when the life estate determined, was held to be liable to the debts of the husband." *Jackson* vs. *Sublett*, 10 B. Mon., 469; *S. P. Garrett* vs. *Gault*, 13 Id., 378.

The Maryland act of March 1st, 1841, was, perhaps, the earliest of the statutes which protected the husband's interest in his wife's lands from execution for his debts. It provided "that no real estate hereafter acquired by marriage should be liable to execution during the life of the wife for debts due from the husband." By the Code of 1860, it is provided: That the property, real and personal, belonging to a woman at the time of her marriage, and all which she may acquire after marriage, by purchase, gift, &c., shall be protected from the debts of her husband, and that she shall hold such property for her separate use, with power to devise the same as if she were *feme sole*, &c. Code p. 325. Philip Horn died in 1834, seized of real and personal estate. His daughter Caroline, married to Ephraim Hoffman in 1845, was entitled to an undivided ninth part of said property. Under a bill filed for partition in 1869, part of the real and leashold estate of the said Philip was sold, and the question was whether the distributive share of Mrs. Hoffman was liable to execution for the debts of her husband contracted in 1869, *i. e.*, nine years after the adoption of the Code. The Court said: "No question can arise, we think, in regard to the proceeds of sale from the leasehold estate. By the law of this State, as it stood at the time of the marriage the husband was entitled to the chattels real of the wife. * * *If so, it must follow that the proceeds arising from the sale of the chattels real belong to the husband, and are liable for his debts.*" *Rice* vs. *Hoffman*, 35 Md., 349. Reaffirmed in *Hoffman* vs. *Rice*, 38 Id., 284. As to the curtesy, the right of "judgment creditors to seize and sell that interest under executions on their judgments" was controlled by the act of 1841. C. 161, Id., 285. *S. P. State* vs. *Carroll*, 6 Mo., App. 263; *Meyer* vs. *McCabe*, 73 Mo., 236.

It remains to examine the solitary case to be found in any of the State tribunals, which has the appearance of holding that, by legislation, which purports only to exempt the property or rights of a married woman, the property or rights of a married man may be included. By § 5, Art. XV. of the Constitution of Oregon, "*The property and pecuniary rights of every married woman at the time of marriage, or afterwards acquired by gift, devise, or inheritance, shall not be subject to the debts or contracts of the husband; and laws shall be passed providing for the registration of the wife's separate property.* Gen. Laws of Oregon, 122. A statute of June 4th, 1859, provides for such registration (from and after which the property recorded is entitled to the exemptions of separate estate); and also for the revocation thereof, and consequent cessation of the separate estate. Id., 786–7. It is plain that what is exempt from execution is the separate property of the wife, that which legally may be and has been registered as such, and even then only so long as it is so registered. In December, 1877, in a case, where the matter in controversy was the wife's share of a donation land claim, the Court gave an opinion which seems to have proceeded on the theory that an existing right of the husband, growing out of a public institution of society, such as marriage, may be made the separate property of the wife, because marriage is an institution over which the legislature exercises a control. In the effort to palliate such a view, not justified, certainly, by the ruling of any other court, Federal or State, the Oregon court, apolegetically, said: "It is a rule in construing constitutions and statutes, that we look at the circumstances which surrounded the law-givers, at the time it was enacted, and ascertain, if we can, the object of the law and the right to be protected. The members of the Convention were mostly farmers, who had acquired land under the act of Congress of September 27th, 1850, granting land to settlers in Oregon. When these settlers were married people, the wife received from the Government an equal share of the land with her husband, and, as there was a vast amount of this land, the title to which was in the married women of the country, a large majority of the members of the Convention enacted this clause, supposing that it would protect this property from the debts and contracts of the husband." *Rugh* vs. *Ottenheimer*, 6 Oregon, 233. Whatever may be thought of the process by which the Oregon court arrived at the conclusion, that the common-law interest of a husband in the lands of his wife might, under statutory enactment, be registered as the separate property of the wife, (upon which condition alone it was exempt), it will not be disputed that property, in this District, lawfully registered as the separate property of a married woman, or ascertained to be legally such, is not subject to be taken in execution for the debts of her husband. A widely different case is before this court.

Moreover, the source of confusion in the Oregon Court is apparent. The Oregon Donation Act of Sept. 27th, 1850, (9 Stat., C. 76, § 4, p. 479), enacts that there shall be granted (on certain conditions) to a married man the quantity of one section, 640 acres, " one-half to himself, and the other half to his wife, to be held by her, *in her own right*, and the Surveyor General shall designate the part enuring to the husband, and that to the wife, and enter the same on the records of his office." It is not surprising, perhaps, that the members of a convention, " mostly farmers," should have construed an estate to be held by the wife, "*in her own right*," to be equivalent to an estate to her sole and separate use. They failed to observe that the Donation Act imposed no trust upon this estate in the hands of the husband, and that therefore the husband, by marriage, acquired the same interest therein that he did in any other legal estate of the wife. As late as 1870, Gray, J., found it necessary to decide, in Massachusetts, that a conveyance of land to a married woman, "in her own right," was not a sufficient conveyance of it "to her sole and separate use." *Merrill* vs. *Bullock*, 105 Mass., 487.

It is certain that a Territorial Legislature, the members of which, doubtless, were "mostly farmers," enacted Jan. 20, 1852, "That all rights, interest of the wife, both legal and equitable, in and to the land donated to settlers in Oregon Territory, by an act of Congress, approved Sept. 27th, 1850, both now and hereafter, be and hereby is secured to the sole and separate use and control of the wife, and such interests, &c., shall in no wise be made subject to or liable for the debts or liabilities of her husband, *whether contracted before or after the passage of this act.* Laws of 1851–2, p. 64. It will be observed that the rights and interests here are protected against the preexisting liabilities of the husband, necessarily for the reason that they were not deemed the rights of the husband at all, but as exclusively the rights of the wife, as if they had been conveyed to a trustee for her sole and separate use. The court, like the Convention and the Territorial Legislature, thought it was dealing with what was in equity, the separate estate of the wife. *Pitman* vs. *Pitman*, 4 Oregon. 299. Thus it was said: "The land, by the act of Congress, belonged to the wife of J. M. * * A Court of Equity has no right to take, by its decree, this land from her, and bestow it on another, because it is an equitable estate." *Murray* vs. *Murray*, 6 Oregon, 30. Plainly the Oregon courts did not think it would divest the husband to make such an estate the separate property of the wife, but that it would be a divestiture of the wife to suffer it to be in any degree, the property of the husband.

Within twenty-five pages of *Rugh* vs. *Ottenheimer*, and at the preceding term the same court said: "*The general* *understanding of the people has been that the wife's portion of a donation claim is separate property, and it has generally been treated as such."* *Linville* vs. *Smith*, 6 Oregon, 204–5.

It is apparent that the peculiarity of the Oregon court consists not so much in holding, that an existimg interest of the husband is exempted under the phraseology of the Oregon constitution, but in holding that what would elsewhere be deemed such an interest in the husband, under the operation of the Oregon Donation Act, is, in point of fact, the separate property of the wife; and that owing to antecedent legislation peculiar to the Territory of Oregon, it was so described or misdescribed by the framers of the State constitution.

The right view of the question had, however, been taken prior to *Rugh* vs. *Ottenheimer*, by the U. S. District Court for Oregon, which seems to have been less swayed by "the general understanding of the people." On September 4th, 1865, execution issued on the interest of the defendant, A. H., in land claimed by his wife, Christina Hamilton. A part of the land (block 250), so sought to be taken, had been bought with money belonging to the wife before marriage, and conveyed to her by deed of February 13th, 1858. Another part (lots 3, 4, 5 and 6), in block (253), was conveyed to the wife March 28th, 1866. The court (Deady, J.) asks: " *What then was the interest, if any, of A. Hamilton in the property in question, on September 4th, 1866? Block (250) was conveyed to the wife February 13th, 1858.* * * * * *The instrument by which block (250) was conveyed to C. H., did not in any degree impart to it the character of separate property.* * * *Looking then to the nature of the instrument, by which block (250) was conveyed to the wife, and the law as it stood at the time of such conveyance, there can be no doubt, but that the husband then became seized of a freehold estate in the same, which could be taken on execution by his creditors.* * * * * *The* *language actually employed in the Constitution is—" shall not be subject to the debts or contracts of the husband." Taken in connection with the following clause providing for the registration of the wife's separate property, I think the words ought to be construed, so far at least as third persons are concerned, as equivalent to a declaration that the property enumerated in § 5 shall be the separate property of the wife. * * If notwithstanding the provision in the Constitution, the husband by reason of the marriage is still invested with a freehold estate in his wife's lands, then it may be well said, as maintained by the plaintiff, that such estate—the property of the husband—may be taken on execution by the creditors of the husband, without conflicting with the provision in the constitution concerning the property of the wife. * * For these reasons I think that the property of the wife, as enumerated or described in the Constitution, ought to be considered her separate estate, in the technical sense of that term—property over which the husband acquires none of the marital rights, known to the common law. At the time the Constitution went into force, and from the date of the conveyance to the wife, the husband had a freehold estate in block (250). This was a vested right. Could the constitution take it away from him and give it to the wife, or should it be so construed? * * * The legistration of this property, on March 28th, 1866, so far as block (250) is concerned, availed the wife nothing. In fact she had no separate property in that block to protect by registration. The plaintiff having succeeded by purchase (at the execution sale), "to the estate or interest of the husband in block (250) is entitled to the possession of the same. * * As to lots 3, 4, 5, and 6, in block (253), the facts are different. They were conveyed to the wife, after the Constitution went into force, and by force of the Constitution, and the registration of March 28th, 1866, must be held to be the wife's separate property."* *Starr* vs. *Hamilton*, Deady 273–7. It is therefore, stated, in the syllabus, (by a judge who was his own reporter).

"The provision aforesaid, in relation to the property of married women, applies to marriages existing when it went into force, *so far as after acquired property is concerned.*" Id., 268. Nothing could give more emphasis to the views maintained in this brief than the point of division between these two tribunals for the State of Oregon. The two are in substantial unison on the point that the exemption clause in the constitutional article relates to separate property of the wife, the State Court being of opinion that the framers of the constitution and the people of the State, believed the wife's share of a donation land claim came under this category, and escaping in the cloud of such "general understanding." On the other hand, the Federal Court held that the husband, prior to the constitutional provision, acquired, by virtue of marriage, a vested interest in the lands of his wife, which was not exempted from execution for his debts, simply because by no correct use of terms could it be designated as the property or pecuniary right of the wife. Further the State Court had before it the case of a donation land claim, and undertook to administer the supposed right in which a wife took under the donation act. The Federal Court, on the other hand, clearly adjudicated the case at bar, viz: the liability of the common law interest of the husband for his debts.

II.

If there were no such authoritative precedents, what is the rule by which we are to be guided in the construction of such a law? Is it not "to look at the precise words, and to construe them in their ordinary sense, unless it would lead to absurdity, or manifest injustice?" Parke B. in *Perry* vs. *Skinner*, 2 M. & W., 471; *R.* vs. *Inhab's, &c.*, 1 A. & E., 142. But can any one say that the context "*clearly shows*" any other construction of this act than the one given by BRADLEY, J., that it relates to "property, which, but for the statute, he (the husband), would acquire an interest in by right of marriage;" and that, "the *sole* object of the act was to prevent his acquiring such interest in her property?" 18 Wall., 145. Can it be said that this meaning, derived from the precise words of the act, construed in their ordinary sense, leads to "absurdity or manifest injustice?" "It is always to be presumed that the legislature when it entertains an intention will express it, and that too in clear and explicit terms." Dwar., 604, *Edrich's Case*, 5 Coke, 118. "Where the language of a statute, read in the order of clauses as passed, presents no ambiguity, courts will not attempt by transposition of clauses, and from what it can be ingeniously argued was a general intent, to qualify, by construction, the meaning." *Doe* vs. *Considine*, 6 Wall., 458. "Our decision," said Lord Tenterden, C. J., "may, perhaps, in this particular case, operate to defeat the object of the 59 Goe. III.; but it is better to abide by this consequence, than to put upon it a construction, not warranted by the words of the act, in order to give effect to what we may suppose to have been the intention of the legislature." *Rex* vs. *Basham*, 8 B. & C., 114; S. P. Bayley, J. in *Brandling* vs. *Barrington*, 6 B. & C., 475. "It is safer," said Ashurst, J., "to adopt what they (the legislature) have actually said than to suppose what they meant to say." *Jones* vs. *Smart*, 1 Durn. & East, 51. "It is the duty of all courts," said Tindal, C. J., "to confine themselves to the words of the legislature; *nothing adding thereto, nothing diminishing.*" *Everrett* vs. *Wells*, 2 Scott, (N. R.), 531. "Every day," said Patterson, J., "I see the necessity of not importing into statutes, words which are not found there." *King* vs. *Burrell* 12 A. & E., 468; S. P. Lord Denman, in *Lamond* vs. *Eiffe*, 3 Q. B., 910; *Samuel* vs. *Nettleship*, 3 id., 188. "The court," said Coleridge, J., "should decline to mold the language of an act for the sake of an alleged convenience or an alleged equity, upon doubtful evidence of intention." *King* vs. *Poor*

Law Com'ers, 6 A. & E. "*Divinatio est not interpretatio qual omnino recedit a litera.*" If, as has been said, "by the use of ambiguous clauses, the legislature would be laying a snare for the subject," what shall be said of an import, so obscurely contained, that every State Court, before which similar enactments have been brought, has declined to discover it.

Further, as a rule of exposition, statutes are to be construed in reference to the principles of the common law. For it is not to be presumed that the Legislature intended to make any innovation on the common law, further than the case absolutely required. The law rather infers that the act did not intend any alteration other than what is specified. For, if the Legislature had such design, it is naturally said they would have expressed it. Dwar., 564; *Burnside* vs. *Whitney*, 21 N. Y., 149; *Sullivan* vs. *LaCross*, 10 Minn., 312; *Bailey* vs. *Byan*, 3 Jones L., 357; *Sibley* vs. *Smith*, 2 Mich., 490; *Esterly's Appeal*, 54 St., 192; *Dewy* vs. *Goodenough*, 56 Barb., 58. The rules of the common law are not to be changed by doubtful implication. *Wilbur* vs. *Crane*, 13 Pick., 284. "For when the legislative power professes to add to the law, as it does in the enactment of an affirmative statute, we cannot assume for it an intention, also, to subtract from it; while there is any admissible rule of interpretation which, applied to the old, to the new, or to both, will enable all to stand." Bishop on Written Laws, § 156. Affirmative statutes, in derogation of prior laws, whether statutory or common, are therefore strictly construed, for the reason that "where two laws stand side by side, with no words of repeal, the one later in date is in its very nature, powerless to take from the earlier anything which is not directly in conflict with it. *Presumption has no room to work. Implication against what is positively ordained, is never permitted in our jurisprudence.*" Id., § 188. This rule loses none of its force when applied in connection with another principle, viz: "*that the legislature must be presumed to have known that the law favored the vesting of the husband's marital rights and required words of exclusion and not mere implication to prevent his marital rights from attaching.*" *Maynard* vs. *Williams*, 17 Ala., 679; and, no less, words of exclusion and not mere implication to prevent all that those rights imply from attaching.

It is on these principles, that notwithstanding statutes of equivalent import to the act of April 10, 1869, the husband's right to the avails of his wife's skill and labor continues absolute. *Robinson* vs. *Hulse*, 24 N. Y., 372; *Edson* vs. *Hayden*, 20 Wis., 682; *Duncan* vs. *Roselle*, 15 Iowa, 501; *Cramer* vs. *Redford*, 17 N. J., Eq. 307; *McCluskey* vs. *Provident, &c.*, 103 Mass., 300. This result cannot be varied by changing the earnings into a form of property which the statutes entitle her to hold to her separate use. *Hay* vs. *Hayes*, 56 Ill., 342; *Gerry* vs. *Gerry*, 11 Gray, 381. It was decided by this Court in 1876, that the wife's earnings in this District were not protected against the creditors of the husband. What was the ground of this decision? It was because while cohabiting with her husband, her earnings "are not made her property," or, as was said by Strong, J.: "The acts of Congress respecting the rights of married women in this District *do not assure such property to the wife*. *Seitz* vs. *Mitchell*, 94 U. S., 584. Such earnings, not having been made the wife's by statute, remain the husband's. Being the husband's, it follows that they are not protected against his creditors. The question recurs: "Is the husband's interest in her realty 'made her property?' Does the act of Congress 'assure such property to the wife?'" If the earnings of the wife's individual exertions, subsequent to the act, are not made her property, how can a freehold estate in the husband, distinct from that of the wife, prior to the act, be so treated?

On the same principles it has been held, notwithstanding enactments, "at least as broad as any which exist in this District," that if the husband survive the wife, his common law rights as tenant by the curtesy are not affected as to the real estate of the wife undisposed of at her death; because a strict construction of such enactments requires no more than the exclusion of the husband, during the wife's life, from control of her estate. *Hatfield* vs. *Sneden*, 54 N. Y., 280; *Kingsley* vs. *Smith*, 14 Wis., 360. As was said by Strong, J., in 1861, "In this State, a surviving husband is entitled to curtesy of land of his deceased wife, of which he had only a potential seisin." *Buchanan* vs. *Duncan*, 40 Pa. St., 88.

Very recently, it was said in Massachusetts: "To permit a man to attach to a valuable interest in property retained by himself the quality of inalienability and of exemption from his debts, seems to us to be going further than a sound public policy will justify," and held: "A person cannot settle his property in trust to pay the income to himself for life, with a provision that it shall not be alienated by anticipation, so as to prevent his creditors from reaching his income by a bill in equity; and this rule applies to a married woman settling her separate property, after marriage, where, by law, she has a right to make contracts." *Pacific Nat. Bank* vs. *Windram*, 133 Mass., 175. If, then, the benefit of property released from its burdens is in violation of sound policy, when sought to be accomplished by an individual for himself or herself, the act of the Legislature by which a similar exemption is claimed, should at least be explicit. *Prima facie*, the responsibility of estates is commensurate with their enjoyment. The implication is rather that the law does not intend that an estate shall accrue than that it shall accrue exonerated from the liabilities of the owner. *McKee* vs. *McKee*, 17 Md., 360.

Hence it is laid down: "*Statutes in derogation of the common rights of creditors to secure their debts out of the property of their debtors, ought to have a strict construction.*" *Buckingham* vs. *Billings*, 13 Mass., 85; *Danforth* vs *Woodward*, 10 Pick., 423. The language of Redfield J., in *Bruce* vs. *Thompson*, 26 Vt., directs attention to the strictness with which should be construed the exempting portion of a married woman's act. S. P., *Lucas* vs. *Rickerich*, 1 Lea., 726; *Kidwell* vs. *Kilpatrick*, 70 Mo., 214; *Hall* vs. *Stephens*, 65 id; *Tillman* vs. *Tillman*, 50 id., 41; "In these modifications of the common law, courts cannot go beyond *the obvious meaning of the statute*." *Fisk* vs. *Wright*, 47 id., 351. The general ruleis that all the property of a debtor is applicable to the payment of his debts. The effect of exemption laws is to create exceptions to this general rule. Therefore a debtor making this claim must bring himself strictly within the terms of the law allowing the exemption. It is for him to put his finger upon the provision of the statute, which, by its terms, withdraws the property claimed from the operation of the general rule. *Rue* vs. *Alter*, 5 Denio; *Wygant* vs. *Smith*, 2 Lansing, 185; *Godwin* vs. *Colorado*, 110 U. S., 1; *Olson* vs. *Nelson*, 3 Minn., 53; *Ward* vs. *Hugh*, 16 id., 159; *Guillory* vs. *Deville*, 21 La. An., 686; *Fuselier* vs. *Buckner*, 28 id., 594; *Briant* vs. *Lyons*, 29 id., 65; *Davis Dodds*, 20 Ohio St., 473; and McCrary, J., in *Spitly* vs. *Frost*, XV., Fedeal Reporter, 299. Exemptions in married women's acts furnish the strongest confirmation of the rule of strict construction. Wherefore of the New York act it was said: "Pre-eminently, in the construction of exemption laws, the doctrine is applied *expressio unius, exclusio alterius*. *Hatfield* vs. *Sneden*, 54 N. Y., 280 (1873).

The one ground upon which it is sought to be maintained that the act of April 10th, 1869, should not be construed to relate only to property acquired after its passage, is that the two clauses "shall not be subject to the disposal of her husband, nor be liable for his debts," are in such case superfluous; the first clause, "that her right to such property shall be as absolute as if she were unmarried," being amply sufficient to protect such after-acquired property. If this were admitted, it might be answered in the words of Lord Denman: "If we find language used, which is incapable of a meaning, we cannot supply one. It is true that the words as they stand, are useless, *a case, perhaps, not infrequent.*" *Green* vs. *Wood*, 7 Q. B., 178. But a more exact explanation is at hand.

There are two classes of Married Women's Acts,—exempting statutes, such as those of Vermont, Tennessee, the Maryland act of 1841, and enabling statutes like that for this District. Under the former, the husband does not lose and the wife does not acquire any rights of property, but common-law rights acquired by marriage continue in the husband, subject to an exemption from his liabilities. The enabling statutes, on the other hand, "do not affect the common-law rights of curtesy actually vested before their passage; nor do these statutes affect the husband's interest in the wife's estate during coverture, which may have existed before their enactment, nor can such interest in any part of the wife's lands, which she may have acquired before the enabling statute took effect, be affected by them, nor can these statutes, in any case, have a retroactive force." Kelly on Contracts of Married Women, p. 96. These statutes were enacted to abrogate the common-law rules by which the property of the wife passed to the husband by virtue of the marriage. *Phillips* vs. *Grover*, 20 O. St., 381; *Todd* vs. *Lee*, 15 Wis., 380. The trust in equity and these statutes aim to accomplish the same object, both creating a separate estate for the same purpose. The enabling statutes give to the wife a separate estate at law in her property, instead of letting it pass to her husband, just as the trust gave her a separate estate in equity. Kelly, 262-3-4. The principle derived from equitable estates of inheritance is generally followed by the adjudications under the enabling statutes in this country, which look at the statute creating the separate use, as occupying the place of the trust deed which created the separate use, only that the former makes a legal estate whilst the latter created an equitable estate. *Beach* vs. *Miller*, 51 Ill., 209; *Martin* vs. *Robson*, 65 Id., 132; *Burke* vs. *Valentine*, 52 Barb., 412; *Johnson* vs. *Cummins*, 1 C. E. Green 97; *Houston* vs. *Brown*, 7 Jones (N. C.) 161; *Houck* vs. *Ritter*, 76 Pa. St., 280. Therefore, just as a devise to the sole and separate use of a wife will not prevent the husband's taking by the curtesy, where the wife dies seized. *Appleton* vs. *Rowley*, L. R., 8 Eq., 139; so we have seen, under these enabling statutes, the husband still retains his curtesy, where the wife dies seized, leaving him surviving, and the property undevised.

Now in the case of the trust, the cases require very distinct and unequivocal expressions to create a separate interest in the wife. *Massey* vs. *Parker*, 2 M. & K., 174. "Although, in *Stanton* vs. *Hall*, 2 R. & M., 175, the whole machinery of the instrument proved that such must have been the intention, the required words of exclusion were wanting." *Blacklow* vs. *Laws*, 2 Hare, 50. "*The marital right is protected by stricter rules than are applicable, at the present day, to any other* right of property." Id. A devise of real and personal estate to a woman, her heirs, executors, administrators and assigns, for her and their own sole and absolute use and benefit, was held insufficient to create a separate estate. L. R. 2 Eq , 177, (1866). *Troutbeck* vs. *Boughey*, Id., 534; *Beilby* vs. *Boyes*, 1 Glyn. & Jann., 167-176; *Gilbert* vs. *Lewis*, 1 De., G. J. & S., 37.

~~On the other hand,~~ A testator's settlement of property upon his daughters, free from the liabilities and control of their respective husbands—held not to include the rents and profits of their property. *Ordway* vs. *Bright*, 7 Heisk, 681. The husband is not excluded except by words which leave no doubt of the intention. *Massey* vs. *Parker*, 2 M. & K., 174; *Buck* vs. *Wrotten*, 24 Grat., 250; *Pollard* vs. *Merrill*, 15 Ala., 169; 23 Id., 438, 488; *Buruley* vs. *Thomas*, 63 Mo, 392, 47; *Brown* vs. *Sebree*, 2 Bush., 115; 6 Id., 157; 9 Id., 403; *Artope* vs. *Goodall*, 53 Ga., 318; *Carroll* vs. *Renich*, 15 Miss., (7 S. & M.,) 798; 17 Ind., 636; 1 Strobh., Eq., 370; 3 Rich., Eq., 208, 398; 9 Id., 85; 1 Leigh, 443; 2 Rob., (Va.,) 601.

"If," said Lord Brougham, "a sufficient strength of negative words is not to be found in the gift or limitation, we are not allowed to fish about for indications of intention from other parts of the instrument." *Tyler* vs. *Lakė*, 2 R. & M., 183. The law is that the *jus mariti* in an estate conveyed to a woman cannot be excluded without a clear and unequivocal expression of such intent in the deed. *Paul* vs. *Leavitt*, 56 Mo. Hence it is laid down that to create a separate estate in a married woman, there should be provisions which negative or exclude the marital rights of the husband, while giving property to the use of the wife. *Baal* vs. *Morguer*, 46 Mo., 48. "*A conveyance of property to a trustee, for the sole and separate use of a married woman, free from the debts and claims of her husband, creates in her a separate estate by contract.*" *Sprague* vs. *Tyson*, 44 Ala., 338. "A separate estate exists in the wife, where the husband has no interest in her property, and no control over it, and where it is not liable to the payment of his debts." *Firemen's, &c.*, vs. *Bay*, 4 Barb., 414; *Colvin* vs. *Currier*, 22 Id., 384. Story, Eq., § 1381; Schouler, Dom., Rel., 191. This is the definition of a separate estate.

Such being the favor of the law to the *jus mariti*, and the strictness with which the wife's separate use was construed, it was natural that conveyances to such uses should employ not only affirmative words giving the estate to the wife, but also words of negation and exclusion denying it to the husband. *Wilkinson* vs. *Bright*, 6 B. Mon., 576. In contemplation of marriage, property was conveyed to a trustee, with a recital that it was "*the real intention of this conveyance to continue the said Gulielma, D., in reference to her said property a feme sole, to all legal intents and purposes, but which further provided that it should be held in trust "for the sole and separate use of the said Gulielma, D., and her heirs forever, free from the claims of any creditor or creditors of the said L. M. (the husband), and free from his power of disposition.*" *Head* vs. *Temple*, 4 Heisk, 38. So land was conveyed to S. B. B., for the sole and separate use of his wife, "free from the control of her said husband or his creditors." *McChesney* vs. *Brown*, 25 Grat., 394.

In 1874, the Court of Appeals of Virginia said: "*The devise is by the grandfather to his daughter, 'E. A. Gardner and her children, * * * and to and for her and their sole and separate use and benefit, and not to be subject to or liable in any way whatsoever for the debts of her husband, H. D. Guenther. It is clear that under this clause there is a plain and distinct intention to exclude the marital rights of the husband of his daughter, E. A. Gardner. But is there no doubt of his intention to exclude the future husbands of his grand daughters.* * * *In the absence of such clear intention and decided purpose the marital rights of the husband are not excluded and must attach.*" *Buck* vs. *Wrotten*, 24 Grat., 254, 255.

The enabling statutes in this country, which were enacted not for the exemption of the husband but for the emancipation of the wife, have retained the forms of expression for the creation of the separate estate in law, which experience and adjudication had shown to be essential for the creation and security of the trust in equity. As was said said in New York of the legislation of that State: "Those statutes are but the adoption of the equitable rules of this court, considered as a Court of Equity, and applying those rules to all the property of the wife whether legal or equitable." *Colvin* vs. *Currier*, 22 Barb., 382. For the reason that such is the purport of these statutes. Mr. Schouler in his treatise on Husband and Wife, lays it down, that "Where a complete legal estate has already vested in the husband, it is not taken away from him"—adding in a note—"and hence the husband's interest therein can be taken and sold on execution." § 211. The same thing is repeated by Mr. Wells in his work on "Separate Property of Married Women." § 19.

The act of April 10th, 1869, first says, generally that the right of a married woman to property derived in any other way than from her husband "shall be as absolute, as if she were feme sole;" and then, in the same sentence annexes the specific attributes of such an estate. These are exemption from the husband's obligation and control, and subjection to the wife's. Every other attribute is as much included in the generality of the first expression, as that of non-liability for the debts of the husband—the liberty to herself to convey, devise, and bequeath the same; to contract and sue, and be sued in respect thereto. For, unquestionably, if she were actually *feme sole* she could do every one of these things, in respect of any property owned by her, without the aid of legislation. All of these properties are essential to the complete definition of a separate estate in a married woman. They are all obnoxious to the same criticism. They are equally important or equally superfluous.

For the reason that the enabling statutes repeat the purpose, as they imitate the form of the equitable trusts, their effect is from the time of their enactment to dispense with the trustee, and to say all estate coming to the wife hereafter shall be held by her, as if it had been conveyed upon trusts corresponding to the provisions of the statute, ~~can~~ We

May ascertain instantly upon what interests they can operate, by the simple inquiry whether, at the date of the statute, the same could have been conveyed by any father, relative, or friend in trust for the wife. If such conveyance could have been made, then the legislature may dispense with the trustee, and say all estate coming to the wife hereafter shall be held by her, as if it had been conveyed upon trusts corresponding to the provisions of the statute. But clearly the legislature cannot contemplate this possibility in respect to an existing tenancy by the curtesy.

As under the trust, so under the statute, the wife receives no power which is not expressly given, and the husband is denied none from which he is not clearly excluded. Thus, under the 3d section of the New Jersey act of March 25, 1852, "that it shall be lawful for any married female to receive by gift, grant, &c., and hold to her sole and separate use, as if she were a single female, real and personal property, and the rents, issues, and profits thereof; and the same shall not be subject to the disposal of her husband, nor be liable for his debts," (Laws of 1852, p. 407,) the power of disposal not being expressly given to the wife, it was held that she did not possess it, *Freeland* vs. *Ryno*, 26 N. J., Eq. 160; *Huyler* vs. *Atwood*, Id., 504; although the control of the husband is expressly prohibited, the control of the wife is not expressly granted, and the court would not imply it. *Belford* vs. *Crane*, 1 C. E. Green, 272. "I am not disposed," said the chief justice, "to extend by construction the act in question, by holding that the power of conveying and devising flows from the general words of the act." *Naylor* vs. *Field*, 5 Dutch, 289.

In Tennessee, by act of 1849, code § 2,481, "the interest of a husband in the real estate of his wife, acquired by her, either before or after marriage, by gift, devise, or descent, or in any other mode, shall not be sold or disposed of by virtue of any judgment, decree, or execution against him,

&c." In 1878, the court held, " the rents and profits of real estate to which a married woman acquires title during marriage, are subject to the debts of the husband, if there be no technical separate estate, and no words excluding the husband's rights." *Lucas* vs. *Rickerich*, 1 Lea, 726.

Before the adoption of the South Carolina constitution of 1868,* a testator left a sum of money to be secured to his daughter, *free from the control of her husband or from liability for his debts.* Held, that after the adoption of the Constitution, the executor was justified in paying the amount to the daughter, *the provisions of the Constitution providing for that which the testator desired.* *Witte* vs. *Clarke*, 17 S. C., 313.

It is to be added to the foregoing, that the substance, and very nearly the exact language of the married women's law for this District had received judicial construction (as has been abundantly shown) prior to April 10th, 1869, when it was approved. Where the terms of a statute which has received a judicial construction are used in a later statute, whether passed by the legislature of the same State or country, or by that of another, that construction is to be given to the later statute. *Com.*, vs. *Hartnett*, 3 Gray, 450; *Bloodgood* vs. *Grasey*, 31 Ala., 575; *Dreman* vs. *People*, 10 Mich., 169; *Pangborn* vs. *Westlake*, 36 Iowa, 546; *Harrison* vs. *Sager*, 27 Mich., 476; *Greiner* vs. *Klein*, 28 Id., 12; *Pærtner* vs. *Russell*, 33 Wis., 193; *Anderson* vs. *May*, 10 Heisk, 90; *Hess* vs. *Peg*, 7 Nev., 23; *Leavenworth County* vs. *Mine*, 7 Kan., 480; *People* vs. *Murray*, 4 Cal., 50.

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*This provided that the real and personal property of a woman held by her at the time of marriage, or that which she may thereafter acquire, either by gift, grant, inheritance, devise, or otherwise, shall not be subject to levy or sale for her husband's debts, but shall be held by her as her separate property, and may be bequeathed, &c., as if she was unmarried; provided that no gift or grant from the husband to the wife shall be detrimental to the just claims of his creditors." In 1878, the court said: " This estate (the curtesy) in the husband is property, and as much liable to the claims of his creditors as any other property he may have." *Boukright* vs. *Epting*, 11 S. C., 74.

Inasmuch, then, as statutes identical in terms with the one under review, had, prior to April 10th, 1869, been invariably interpreted to be, in the language of Bradley, J. acts, "the *sole* object of which was to prevent the husband's acquiring such interest in the wife's property, as but for the statute he would acquire by right of marriage," and in no case to be acts exempting the husband's interest from liability for his debts, why should not the same terms be presumed to have been employed by Congress in the current and adjudicated sense? If the Legislature of Illinois, in adopting the 32d Henry VIII, ch. 34, § 1, will be presumed to have intended to adopt the judicial construction that had been placed on that statute, *Fisher* vs. *Deering*, 60 Ill., 114, why should not Congress, in adopting in substance the act of Illinois, be presumed to have intended a kindred construction? If we adopt the view of the Oregon Court, that "it is a rule in construing constitutions and statutes that we look to the circumstances which surrounded the law given at the time it was enacted; the circumstance that the bill to regulate the rights of property of married women in this District, was reported by Mr. Trumbull, who himself had been an eminent member of the Illinois bench, affords ground for the presumption, that he, at least, must have attributed to an act, conched in substantially the same terms with that of his own State, substantially the same effect, and what that effect was had been settled, four years earlier, by the opinion in *Rose* vs. *Sanderson*, with which he must have been familiar." Certainly we are not to assume in respect to the Senate and House of Representatives of the United States, as in *Rugh* vs. *Ottenheimer* was assumed, in respect to the Oregon convention, that being composed of members, "mostly farmers," they may fairly be presumed to have used the words of a statute in their rural rather than their legal sense.

Further, when this statute was re-enacted in the Revised

Statutes, it had received the judicial construction of this Court, and was therefore re-enacted subject to that construction. As was said by WAITE, C.-J., in *Douglass* vs. *County of Pike:* "The settled judicial construction of a statute, so far as contract rights were thereunder acquired, is as much a part of the statute as the text itself, and a change of decision is the same in its effects on pre-existing contracts as a repeal or amendment by legislative enactment." 101 U. S., p. 677.

It is as if there had been annexed to the statute the qualification—that the *sole* object of the act was to prevent the husband from acquiring in the future, those rights in the property of his wife, which but for the statute he would have acquired. "When a law antecedently to the revision of the statutes is settled, either by clear expressions in the statutes or adjudications on them, the mere change in the phraseology shall not be deemed a change of the law unless such phraseology evidently purport an intention of the legislature to work a change." *Douglas* vs. *Douglas*, 5 Hun. 140; S. P. *Parramore* vs. *Taylor*, 11 Grat., 220; *Lee* vs. *Forman*, 3 Metc. (Ky.,) 114.

III.

It is said in Cruise Dig., tit. V. ch. ii, § 12, that curtesy is much favored in equity," and (Id. § 15) that "an equity of redemption of an estate in fee simple, is subject to curtesy." "The same seizin which, if the property were legal would give the husband a title to curtesy, will give it where the property is equitable." Kelly on Contracts of Married Women, § 89, 1 Bright H. & W., 143: *Norman* vs. *Grattan*, 63; *Davis* vs. *Mason*, 1 Pet., 503; *Shoemaker* vs. *Walker*, 2 S. & R., 554: *Rawlins* vs. *Adams*, 9 Md., 26.

In the court below the doctrine of the wife's equity was invoked but plainly it has no application to this case. It is applicable, when the husband is obliged to resort to a Court of Equity, in order to recover the wife's property. Story Eq. § § 1403, 1405; Willard's Eq., 636; Bell H & W., 114; *Howard* vs. *Moffat*, 2 Johns, ch. 206; *Udall* vs. *Kenney*, 3 Cow., 590; *Briggs* vs. *Mitchell*, 60 Barb., 315; *Boukright* vs. *Epting*, 11 S. C., 74. In the two cases last mentioned, the claim was made under conditions identical with those which apply to the case at bar.

LEIGH ROBINSON,

Of Counsel for Appellee.

112-713

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 118.

SOLOMON HALFERTY, PLAINTIFF IN ERROR,

vs.

HERMAN WILMERING.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

FILED OCTOBER 17, 1881.

SUPREME COURT OF THE UNITED STATES.

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1 & 2 Pleas in the circuit court of the United States for the district of Iowa, central division, at a term thereof begun and holden in the United States court-house, in the city of Des Moines, before the Hon. George W. McCrary and Hon. J. M. Love, judges, on the tenth day of May, A. D. 1881.

3 Be it remembered that heretofore, to wit, on the 19th day of April, 1878, the plaintiff, Solomon Halferty, by Parsons and Runnells, his attorneys, filed in the clerk's office of said court his præcipe for a summons against Herman Wilmering, which said præcipe for summons is in the words and figures following, to wit:

4 To the clerk of the United States circuit court, district of Iowa:

Please issue process out of said court pursuant to the directions below:

Plaintiff, Solomon Halferty, citizen of Missouri.
Defendant, Herman Wilmering, citizen of Iowa.
Form of process, summons.
On what brought, contract.
Amount of claims, three thousand dollars.
Amount of damages, five hundred dollars.
Date of præcipe, April 19, 1878.
When returnable ——.

PARSONS & RUNNELS,
Attorneys for Plaintiff.

(Endorsed:) No. 2570. United States circuit court, district of Iowa. Solomon Halferty *vs.* Herman Wilmering. Præcipe for summons. Filed Apr. 19, 1878. E. R. Mason, clerk. Parsons & Runnels, attorney- for plaintiff.

5 And on the 24th day of April, 1878, a summons was filed in said cause; which said summons, together with the marshal's return thereon are in the words and figures following, to wit:

6 UNITED STATES OF AMERICA, *District of Iowa*:

To the Marshal of the district of Iowa:

In the name of the President of the United States you are hereby commanded to summon Herman Wilmering, a citizen of the State of Iowa, to appear before the honorable circuit court of the United States in and for the district of Iowa, on the first day of the next term thereof, to be begun and holden at the city of Des Moines on the second Monday of May next, it being the 13 day fo May, A. D. 1878, then and there to answer unto Solomon Halferty, a citizen of the State of Missouri, in an action on contract for the sum of three thousand dollars, to the damage of said plaintiff in the sum of $500.00.

Hereof fail not, and have you then and there this writ.

Witness, the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Des Moines, this, the 19th day of April, A. D. 1878, and of the Independence of the United States the 102 year.

7 [SEAL.] (Signed,) E. R. MASON,
Clerk U. S. Circuit Court, District of Iowa.

(Endorsed:) No. 2570. Summons. Circuit court of the United States, district of Iowa. Solomon Halferty *vs.* Herman Wilmering. Filed April 24, 1878. E. R. Mason, clerk. Parsons & Runnells, attorneys for plaintiff; residence, Des Moines.

This writ came into my hands for service on the 20 day of April, A. D. 1878, and I served the same on the within-named Herman Wilmering on the 22d day of April, 1878, by reading the same to Louisa Wilmering, his wife, and an adult member of his family over 14 years of age, and by delivering a true copy to her at the residence of said H. Wilmering in the county of Washington and State of Iowa, said H. Wilmering not being found. (S'g'd) J. W. Chapman, U. S. marshal, by S. S. Ethridge, deputy.

Marshal's fees:

Mileage, 160 miles	$9 60
Service on	$2 00
Copy	50
	$12 10

8 And on the 1st day of May, 1878, a petition was filed in said cause; which said petition is in the words and figures following, to wit:

9 *Petition.*

In the Circuit Court of the United States, District of Iowa.

SOLOMON HALFERTY *v.* HERMAN WELLMERING.

The plaintiff, who is a citizen of the State of Missouri, brings this his action against the defendant, who is a citizen of the State of Iowa, and for cause of action states:

That, on the 29th day of August, 1876, he entered into a written contract with the said defendant, a copy of which, marked "Exhibit A," is hereto annexed and made a part hereof, by the terms of which said defendant undertook to deliver one thousand merchantable hogs, to average not less than two hundred and fifty pounds each, at Plattsburg, Clinton county, Missouri, during the month of December, 1876, at four dollars and fifty cents per hundred gross weight, and that he undertook to receive and pay for the same when delivered in car-loads or whole amount.

10 That plaintiff, in accordance with the further terms of the contract, offered to deposit one thousand dollars with the Union Stock Yard National Bank, which the latter refused to receive, whereupon by agreement of the parties said sums of one thousand dollars to be deposited by plaintiff and defendant were severally retained by their agents, with the understanding and agreement that

said sums should be held upon the same terms and subject to the same conditions as if they had been deposited with said Union Stock Yard National Bank.

That hogs, such as were contracted by defendant to be delivered to plaintiff, were worth during the whole of said month of December five & $\frac{75}{100}$ dollars per hundred weight at Plattsburg, where the defendant agreed to deliver them.

That plaintiff was ready to receive said hogs and perform the said contract on his part, but that defendant has wholly failed
11 to comply with the terms and conditions thereof.

Wherefore plaintiff asks judgment in the sum of twenty-seven hundred and fifty dollars, with interest thereon at the rate of — per cent. and costs of this action.

(Signed) PARSONS & RUNNELLS,
Atty's for Pl'ff.

EXHIBIT "A."

Article of agreement made this day between Sol. Halferty of the first part and Herman Willmering of the second part, said party of the second part agrees to deliver to the party of the first part one thousand (1,000) hogs (merchantable), to average two hundred and fifty (250) pounds or over, delivered at Plattsburg, Clinton county, Missouri, in the month of December, 1876, at the seller's option, at four dollars and fifty cents per hundred gross weight, to be delivered any day in the month above mentioned, said first part to be ready
12 to receive and pay for the hogs when delivered in car loads or whole amount.

Each party hereby agrees to deposit one thousand dolls. ($1,000) each in the Union Stock Yard National Bank for the faithful performance of the above contract, the thousand dollars to be forfeited to the party who fails to perform his part of the contract.

S. HALFERTY.
H. WILLMERING.

Witness—
A. TINZULIN.
M. C. OTT.

Endorsed: U. S. circuit court. S. Halferty *vs.* H. Willmering. Petition. Filed May 1, 1878. E. R. Mason, clerk. Parsons & Runnells, att'ys for pl'ff.

13 And on the 14th day of May, 1878, in the record of the proceedings in said court, is an entry in said cause in the words and figures following, to wit:

14 United States Circuit Court, District of Iowa. May Term, 1878.

TUESDAY, *May* 14, 1878.

SOLOMON HALFERTY
vs.
HERMAN WILMERING. } No. 2570. Law.

This cause coming on this day for hearing, leave was given defendant to answer by May 28, 1878, and the case then to be continued.

15 And on the 25th day of May, 1878, the defendant, Herman Wilmering, by R. Caldwell, his attorney, filed his answer in said cause; which said answer is in the words and figures following, to wit:

16 *Answer.*

In the Circuit Court of the United States, District of Iowa.

SOLOMON HALFERTY *vs.* HERMAN WELLMERING.

Comes now the defendant in the above-entitled cause, and for answer to the petition of plaintiff heretofore filed in said cause, *and* says:

1st. Denies each and every material allegation therein contained and not hereinafter admitted.

2d. Admits that he entered into a contract with pl'ff in writing, as stated in pl'ff's petition; also admits that pl'ff is a citizen of Missouri, and that def't is a citizen of Iowa, as stated in pl'ff's petition.

3d. Defendant denies that he ever at any time violated any of the conditions of the contract.

Denies that he (def't) is indebted to pl'ff in the sum of twenty-seven hundred and fifty dollars, as stated in said petition of pl'ff, or in any other sum.

17 4th. Defendant, for further answer and by way of counter claim on cross-action, says: That on the 29th day of August, 1876, this pl'ff and def't entered into a contract in writing, being the same as mentioned in pl'ff's petition, and a copy of which is attached to pl'ff's petition, marked Exhibit "A," which said copy def't hereby makes a part, and asks that it be considered as a part of this answer.

That by the terms of said contract pl'ff agreed to deposit with the Union Stock-Yard National Bank the sum of $1,000.00 as soon as the said contract was signed.

That this def't offered to deposit on said 29 day of August, 1876, with said bank the said sum of $1,000.00, and has always been ready and willing to deposit said money with said bank; that this pl'ff neglected and refused to deposit said money with said bank, according to the terms of said contract; that this pl'ff never at any
18 time after the signing of the said contract offered to deposit in said bank the said money, nor even tendered said money to said bank, as required by the terms of said contract; that by reason of the above this def't has been damaged in the sum of one thousand dollars, with interest at the rate of six per cent. per annum from the 29th day of August, 1876.

Wherefore def't asks judgment for one thousand dollars, with interest at the rate of six per cent. per annum from the 29 day of August, 1876, besides costs.

(Signed) R. CALDWELL,
Att'y for Def't.

(Endorsed :) Solomon Halferty *vs.* Herman Willmering. Answer. Filed May 25, 1878. E. R. Mason, clerk.

19 And on the 2nd day of November, 1878, in the record of the proceedings in said court, is an entry in said cause, in the words and figures following, to wit:

20 United States Circuit Court, District of Iowa. October Term, 1878.

SATURDAY MORNING, *November* 2, 1878.

SOLOMON HALFERTY
vs.
HERMAN WILMERING. } No. 2570. Law.

This cause coming on this day for hearing was continued.

21 And on the 24th day of May, 1879, in the record of the proceedings in said court, is an entry in said cause, in the words and figures following, to wit:

22 United States Circuit Court, District of Iowa. May Term, 1879.

SATURDAY, *May 24th*, 1879.

SALOMON HALFERTY
vs.
HERMAN WILMERING. } No. 2570.

This cause coming on this day for hearing was continued.

23 And on the 20th day of October, 1879, the plaintiff filed his reply to the defendant's answer; which said reply is in the words and figures following, to wit:

24 *Reply.*

In the Circuit Court of the United States in and for the District of Iowa.

SOLOMON HALFERTY *vs.* HERMAN WILLMERING.

Now comes the plaintiff, and for reply to so much of defendant's answer as sets forth or alleges matters by way of counter claim, denies each and every allegation thereof.

(Signed) PARSONS & RUNNELLS,
Pl'ff's Att'ys.

(Endorsed :) No. 2570. Law. Halferty *vs.* Willmering. Reply. Att'ys, P. & R. Filed Oct. 20, 1879. E. R. Mason, clerk.

25 And on the 7th day of November, 1879, an amendment to the petition was filed in said cause; which said amendment is in the words and figures following, to wit:

26 In the Circuit Court of the United States in and for the District of Iowa.

SOLOMON HALFERTY *ag't* HERMAN WILLMERING.

The plaintiff amends the petition as follows:

First. By inserting therein upon the third page thereof, immediately preceding the prayer for judgment, as follows, to wit:

That plaintiff offered and ordered to the said bank the said sum of one thousand dollars in all respects as agreed upon by said written agreement, and the said bank refused to receive the same upon the terms and for the purposes therein specified. That therefor- it was further mutually agreed by parol between the parties hereto that said sum should be deposited by the parties with their respective 27 agents then named, to be held by them instead of said bank, but in all other respects according to the laws and conditions of said written contract. That plaintiff thereupon deposited the said sum with the person so agreed upon, by whom it was so held until after the expiration of the time of performance specified in said written contract.

Second. By striking out the words "five and ^{75}" upon the second page thereof, and inserting in lieu thereof the words "six and ^{50}."

Third. By striking from the prayer for judgment the word "twenty," and inserting in lieu thereof the word "thirty."

(S'g'd) PARSON & RUNNELLS,
Pl'ff's Att'ys.

(Endorsed:) U. S. C. C. Solomon Halferty *v.* Herman Willmering. Amendment to petition. Filed Nov. 7, 1879. E. R. Mason, clerk. Parsons & Runnells, att'ys for pl'ff.

28 And on the 7th day of November, 1879, a substituted reply was filed in said cause; which said reply is in the words and figures following to wit:

29 *Amended Reply.*

In the Circuit Court of the United States in and for the District of Iowa.

SOLOMON HALFERTY *ag't* HERMAN WILLMERING.

Now comes the plaintiff, and for a substituted reply to defendant's answer says:

I. He denies each and every allegation therein contained by way of counter claim.

II. For a second and further reply he says: That the said bank refused to receive the said one thousand dollars so to be deposited by each of the parties hereto upon the terms and considerations specified in said contract; that this plaintiff offered and tendered said deposits to said bank in all respects in accordance with his said agreements; and that the said bank so refusing to receive the 30 same, he thereupon notified defendant thereof, and that it was thereupon then and there further orally agreed that the same should remain on deposit in the hands of the agents of these parties respectively, to be by them held upon the term and conditions specified in said contract in the place of and instead of said bank, and that plaintiff did then and there deposit with his agent so agreed upon the said sum of one thousand dollars, and duly notified the defendant that the same was so on deposit, subject to the conditions of said contract.

(S'g'd) PARSONS & RUNNELLS,
Pl'ff's Att'ys.

(Endorsed:) U. S. C. C. Solomon Halferty *v.* Herman Willmering. Amended reply. Filed Nov. 7, 1879. Ed. R. Mason, c'k. Parsons & Runnells, att'ys for pl'ff.

31 And on the 12th day of November, 1879, in the record of the proceedings in said cause is an entry, which is in the words and figures following, to wit:

32 United States Circuit Court, District of Iowa. October Term, 1879.

WEDNESDAY, *November 12th*, 1879.

SOLOMON HALFERTY *vs.* HERMAN WILMERING. } No. 2570. Law.

This cause coming on this day for hearing, plaintiff appeared by Parsons & Runnells, and the defendant by Wright, Gatch & Wright. Then came a jury of good and lawful men, to wit: D. F. Butin, J. F. Stivers, F. M. Ross, A. R. Jones, Charles D. H. Parker, James Lee, John Wyman, Thomas Sargent, N. G. Hedges, M. C. Sexton, Thos. Hatton, Sr., Ira Mitchell, who were duly empaneled and sworn to well and truly try the issues joined, and a true verdict rendered according to the law and evidence given them in court, and they having heard the statement of the case by counsel, and a portion of the evidence were excused until ten o'clock to-morrow morning.

33 And on the 13th day of November, 1879, in the record of the proceedings in said court is an entry in said cause, in the words and figures following, to wit:

34 United States Circuit Court, District of Iowa. October Term, 1879.

THURSDAY, *November* 13, 1879.

SOLOMON HALFERTY *vs.* HERMAN WILMERING. } No. 2570. Law.

This cause coming on this day for further hearing, parties appear by their attorneys, and the jury came the same as on yesterday, and they, having heard ths conclusion of the evidence and a portion of the arguments of counsel, were excused until ten o'clock to-morrow morning.

35 And on the 14th day of November, 1879, in the record of the proceedings in said court is an entry in said cause, in the words and figures following, to wit:

36 United States Circuit Court, Dist. of Iowa. October Term, 1879.

FRIDAY, *November* 14, 1879.

SOLOMON HALFERTY
vs.
HERMAN WILMERING. } No. 2570. Law.

This cause coming on this day for further hearing, parties appear by their attorneys, and the jury came the same as on yesterday, and, having heard the conclusion of the arguments of counsel and the charge of the court, they retired into a private room under charge of a sworn officer to consider their verdict.

37 And on the 15th day of November, 1879, in the record of the proceedings of said court is an entry in said cause, which is in the words and figures following, to wit:

38 United States Circuit Court, District of Iowa. October Term, 1879.

SATURDAY, *November* 15, 1879.

SOLOMON HALFERTY
vs.
HERMAN WILMERING. } No. 2570. Law.

This day the jury return into open court and report that they are unable to agree upon a verdict. Thereupon they were discharged from further consideration of this cause, and the plaintiff was given leave to amend his petition.

39 And on the 17th day of November, 1879, a substituted petition was filed in said cause, which said substituted petition is in the words and figures following, to wit:

40 *Substituted Petition.*

In the Circuit Court of the United States, District of Iowa.

SOLOMON HALFERTY *vs.* HERMAN WILLMERING.

Now comes the plaintiff, and for a substituted petition herein says: First. That heretofore, to wit, on the 29th day of August, 1876, he entered into an agreement in writing with the above-named defendant, a copy of which is hereunto annexed, marked "Exhibit A," and made a part hereof, whereby said defendant agreed to sell and deliver to this plaintiff one thousand merchantable hogs of the weight of two hundred and fifty pounds or over, each, for the agreed price of four dollars and fifty cents per hundred pounds, to be delivered at Plattsburgh, Missouri, upon any day during the month
41 of December, 1876, at the option of said defendant, in car-

loads or full amount, as said defendant should elect, and to be paid for by this plaintiff upon delivery.

Plaintiff further says that he was at all times ready and willing to receive said hogs and to pay for the same according to the terms of said contract, as aforesaid, but that the defendant wholly failed to deliver the same or any part thereof.

Plaintiff further says that said hogs were worth in the market at Plattsburgh aforesaid, during the said month of December, six dollars per hundred.

Wherefore plaintiff says that he has sustained damages by reason of defendant's failure to keep and perform his contract aforesaid in the sum of three thousand seven hundred and fifty dollars, with the interest thereon from the 31st day of December, 1876, at the rate of six per cent. per annum.

42 Second. For a second and further cause of action, plaintiff says that heretofore, to wit, on the 29th day of August, 1876, he entered into a contract in writing with said defendant, a copy of which is hereunto annexed, marked "Exhibit A," and made a part hereof; that plaintiff duly performed all the conditions of said contract upon his part to be kept and performed, but the defendant, disregarding the obligations thereof, wholly failed to keep and perform the same upon his part, and wholly failed and refused to deliver the said hogs, or any part thereof, at the said city of Plattsburgh, although the plaintiff was at all times ready and willing to receive the same, and to pay therefor accordingly to the terms and conditions of said contract. By reason whereof plaintiff has sustained damage in the sum of five thousand eight hundred and sixty-five dollars.

43 Third. For a third and further cause of action, plaintiff says that heretofore, to wit, on the 29th day of August, 1876, he entered into a contract in writing with the defendant, a copy of which is hereunto annexed, marked "Exhibit A," and made a part hereof. Plaintiff further says that said contract was entered into at the city of Chicago, to wit, at the Union Stock Yards Bank, in said city; that immediately upon the execution and after the delivery of said contract by each of the parties thereto to the other this plaintiff tendered the said sum of one thousand dollars, to wit, the check of the agents of this plaintiff, who then had on deposit of the funds of this plaintiff in said bank, but in their own names, the sum aforesaid, and requested the said bank to hold the same according to the terms and conditions of said contract; but the said bank refused to become a party to said contract, or to hold said money in any
44 other way than as an ordinary deposit.

Plaintiff further says that said sum, at all times thereafter, remained on deposit in said bank, with directions by him to his said agents to hold said check, which had been so drawn as aforesaid in accordance with the terms and conditions of said contract. That defendant was fully informed of the refusal of said bank to become a party to said contract, or to hold said money in any other way than as aforesaid; and upon being so informed assented to, and accepted the same as a sufficient compliance with

said contract in respect to the deposit of the said sum of one thousand dollars by this plaintiff, and waived any other or further deposit thereof than as aforesaid, and directed that the money be held as it was then held, to which plaintiff then and there assented, and the said sum did thereafter and at all times remain so on deposit, and the said check did remain so in the hands of his said
45 agent until after the expiration of the time for the delivery
of said hogs, to wit, until after the first day of January, 1877; yet the defendant wholly failed to deliver the said hogs, or any of them, to the damage of this plaintiff in the sum of five thousand eight hundred and sixty-five dollars.

Wherefore and by reason of the several causes of action aforesaid plaintiff demands judgment against the said defendant for the sum of five thousand eight hundred and sixty-five dollars, and the interest thereon, together with the costs of this action.

(Signed) PARSONS & RUNNELLS,
Pl'ff's Att'ys.

46 "EXHIBIT A." (Annexed to and made a part of each count in the foregoing petition.)

CHICAGO, *Aug. 29th*, 1876.

Article of agreement made this day between Sol. Halferty, of the first part, and Herman Willmering, of the second part. Said party of the second part agrees to deliver to the party of the first part one thousand (1,000) hogs (merchantable), to average two hundred and fifty (250) pounds or over, delivered at Plattsburg, Clinton Co., Missouri, in the month of December, 1876, at the seller's option, at four dollars & fifty cents per hundred, gross weight, to be delivered any day in the month above mentioned, said first party to be ready to receive and pay for the hogs when delivered in car-loads or whole amount.

Each party hereby agrees to deposit one thousand doll's ($1,000) each in the Union Stock Yard National Bank for the faith-
47 ful performance of the above contract, the thousand dollars
to be forfeited to the party who fails to perform his part of the contract.

S. HALFERTY.
H. WILLMERING.

Witness:
A. TONZALIN.
M. C. OTT.

(Endorsed:) U. S. C. C. S. Halferty *v.* H. Willmering. Substituted petition. Filed Nov. 17, 1879. E. R. Mason, clerk. Parsons and Runnells, att'ys for pl'ff.

48 And on the 7th day of April, 1880, an answer to said substituted petition was filed in said cause, which said answer is in the words and figures following, to wit:

49 In the Circuit Court of the United States, District of Iowa.

SOLOMON HALFERTY *vs.* HERMAN WILMERING.

Comes now the def't, and for answer to the substituted petition of plaintiff, says:

1. He denies each and every allegation in said petition and the three several counts thereof contained as fully and to the same purpose and effect as though each special allegation were herein specifically put in issue.

2. And further answering said petition, and by way of separate and affirmative defense to the matters and things alleged in the first and second counts in said petition, defendant says:

(Written on margin with pencil, "withdrawn.")

That on the 29th day of August, 1876, plaintiff and this defendant entered into a written contract, whereby this defendant 50 agreed to deliver and said plaintiff to receive at Plattsburgh, Mo., one thousand hogs (merchantable), to average two hundred and fifty pounds or over, at any time in the month of Dec., 1876, at seller's option, the said pl'ff to pay therefor four dollars and fifty cents per hundred, gross weight, and the said parties thereto to deposit for the faithful performance of said contract one thousand dollars each in the Union Stock Yards National Bank at Chicago, Ill., all of which will more fully and at large appear by a copy of said contract attached to pl'ff's said petition, to which reference is hereby prayed, with the same purpose and effect as though incorporated in the body hereof.

Written on margin, "this division withdrawn."

And defendant further shows to the court that plaintiff never deposited said money, to wit, said one thousand dollars, in said Union Stock Yard National Bank, nor did plaintiff, with the knowledge and consent of this defendant, make any other or differ- 51 ent arrangement as a substitute for the deposit so agreed upon between them in and by said contract.

(Signed) WRIGHT, GATCH & WRIGHT, &
R. CALDWELL, *for Def't.*

(Endorsed:) Solomon Halferty *vs.* Herman Willmering. Ans. to amended petition. Filed April 7, 1880. Ed. R. Mason, c'k.

52 And on the 2nd day of October, 1880, a trial notice was filed in said cause, which is in the words and figures following, to wit:

53 In U. S. Circuit Court, District of Iowa.

SOLOMON HALFERTY *vs.* WILLIAM HELMERING.

To E. R. Mason, clerk:

This cause will be set down for hearing and ready for trial on part of plaintiffs at the next term of the court upon issues of facts.

(Signed) PARSONS & RUNNELLS,
Plaintiff's Att'ys.

(Endorsed:) No. 2570. Halferty *vs.* Willmering. Filed Oct. 2, 1880. E. R. Mason. clerk.

54 And on the 21st day of October, 1880, a demurrer to the second division of defendant's answer; which said demurrer is in the words and figures following, to wit:

55 In the Circuit Court of the United States in and for the District of Iowa.

SOLOMON HALFERTY *ag't* ADAM WILMERING.

Now comes the plaintiff and demurs to the second division of defendant's answer to the plaintiff's substituted petition upon the following grounds.

I. The same does not state facts sufficient to constitute a defense to this action for the following reasons:

1. The failure to deposit said sum would not discharge defendant from his obligation to perform said contract upon his part.

2. The condition alleged was not a part of the obligation of the contract, but collateral thereto, and as security for the performance thereof.

3. The deposit of said sum was not a condition precedent to
56 plaintiff's right to recover damages for a failure upon the part of defendant to perform said contract upon his part.

4. Said division admits all of the allegations of plaintiff's petition, and no part is stated therein to avoid the facts stated in the second and third divisions thereof.

II. Said division does not state facts sufficient to constitute a cause of action in defendant's favor against this plaintiff, for the reasons following:

1. It does not state that defendant performed or offered to perform said contract upon his part.

2. It does not show that he has sustained any damages from plaintiff's alleged failure to deposit said sum.

(Signed) PARSONS & RUNNELS,
Pl'ff's Att'ys.

(Endorsed:) No. 2570. Law. Halferty *vs.* Willmering. Demurrer, P. & R. Filed Oct. 21, 1880. E. R. Mason, clerk.

57 And on the 25th day of October, 1880, in the record of the proceedings in said court is an entry in said cause in the words and figures following, to wit:

58 United States Circuit Court, District of Iowa. October term, 1880.

MONDAY, *October* 25, 1880.

SOLOMON HALFERTY
vs.
HERMAN WILMERING. } No. 2570. Law.

This cause coming on this day for hearing, and by leave of court, the defendant withdraws the second division of the answer to the substituted petition.

59 And on the 29th day of October, 1880, an affidavit for continuance was filed in said cause; which said affidavit is in the words and figures following, to wit:

60 In the United States Circuit Court, District of Iowa.

SOLOMON HALFERTY *vs.* HERMAN WILMERING.

UNITED STATES OF AMERICA, } *ss:*
District of Iowa, }

I, Herman Wilmering, being first duly sworn, depose and say: That
I am the defendant in the above entitled cause; that when I left my
home for the purpose of attending the trial therein my wife was
seriously ill, confined to her bed, and objected seriously to my leav-
ing her, feeling that it was unsafe to do so; that I came, understand-
ing the case was assigned for Monday, the 25th inst., and that the
case would probably be tried at once, or would not have left home
at all. I consider the condition of my wife to be such at the pres-
ent time as to demand my immediate return, and such as will not
admit of my remaining long enough to try said cause if the
61 same were now reached for trial; and advised by counsel, and
know such to be the fact, that I am a material witness in the
cause, and cannot safely allow the same to be tried in my absence.

(Signed) H. WILLMERING.

STATE OF IOWA, *Polk County:*

Subscribed and sworn to before me, this 28th day of October, 1880.

[SEAL.] CHAS. L. DAHLBERG,
Notary Public.

(Endorsed:) Halferty *v.* Willmering. Mo. for continuance. Filed Oct. 29, 1880. E. R. Mason, clerk.

62 And on the 28th day of October, 1880, in the record of the proceedings in said court is an entry in said cause in the words and figures following, to wit:

63 United States Circuit Court, District of Iowa. October Term, 1880.

THURSDAY *Oct.* 28, 1880.

SOLOMON HALFERTY }
vs. } No. 2570 Law.
HERMAN WILMERING. }

This cause coming on this day for hearing upon the defendant's application for a continuance, plaintiff appeared, by Parsons & Runnells, and the defendant by Wright, Gatch and Wright; and the court, having heard the affidavit filed by defendant, ordered that the cause be continued, at the costs of the defendant.

64 And on the 16th day of April, 1881, a trial notice was filed in said cause, which is in the words and figures following, to wit:

65 *Notice of Trial.*

U. S. Circuit Court, District of Iowa.

SOLOMON HALFERTY *vs.* HERMAN WILMERING.

To E. R. Mason, clerk of said court:

You are hereby notified that the above case will be ready for trial on the part of the plaintiff at the May term of said court, which will begin on the 10th day of May, 1881.

(Signed) PARSONS & RUNNELLS,
Att'ys for Pl'ff.

(Endorsed:) U. S. circuit court, dist. of Iowa. 2570. Law. Solomon Halferty *vs.* Herman Wilmering. Notice to clerk. Filed Apr. 16, 1881. E. R. Mason, clerk. Parsons & Runnells, att'ys for pl'ff.

66 And on the 16th day of May, 1881, a motion to suppress depositions was filed in said cause; which said motion is in the words and figures following, to wit:

67 U. S. Circuit Court, District of Iowa.

S. HALFERTY *vs.* H. WILMERING.

Comes now the defendant, Wilmering, and moves the court to suppress the answer to direct interrogatory 3 in the deposition of Adam Breckinridge as incompetent, immaterial, and irrelevant, and the entire deposition of Joel Frinkhauser, for the same reasons; the entire depositions of Anthony Touzlin, for the same reasons, and the further reason that it is necessary, and that it is not certified as required by law, and is no more than an *ex parte* affidavit; and the deposition of W. A. Denny, for the same reasons alleged as to Touzlin's.

(S'g'd) BARCROFT, GATCH & McCOUGHAN,
For Willmering.

[End.:] U. S. circuit court. S. Halferty *vs.* H. Wilmering. Notice to suppress depositions. Filed May 16, 1881. E. R. Mason, clerk. B., G. & McC.

68 And on the 19th day of May, 1881, in the record of the proceedings in said court is an entry in said cause in the words and figures following, to wit:

69 United States Circuit Court, District of Iowa. May Term 1881.

THURSDAY, *May 19th*, 1881.

SOLOMON HALFERTY
vs. } No. 2570. Law.
HERMAN WILMERING.

This cause came on this day for hearing. Plaintiff appeared by

Parsons & Runnells and defendant by Bancroft, Gatch & McCoughan. Then came a jury of twelve good and lawful men, to wit: H. C. Horgis, Thomas Flemning, S. A. Foster, J. Gregg, Thomas Connelly, C. S. Brayton, J. P. Foster, Z. De Groat, Elijah Peake, W. J. Bruffey, J. M. Ester, and A. W. Cole, who were duly and legally empannelled and sworn to well and truly try this cause, according to the law and evidence given them in court, and they having heard the statement of the case and a portion of the evidence, were excused until 9 o'clock to-morrow morning.

70 And on the 20th day of May, 1881, in the record of the proceedings in said court, is an entry in said cause in the words and figures following, to wit:

71 United States Circuit Court, District of Iowa. May Term, 1881.

FRIDAY, *May 20th*, 1881.

SOLOMON HALFERTY *vs.* HERMAN WILMERING. } No. 2570. Law.

This cause coming on this day for further hearing, the parties appear by their attorneys, and the jury came the same as on yesterday, and they having heard the conclusion of the testimony and arguments of counsel, were excused until nine o'clock to-morrow morning.

72 And on the 21st day of May, 1881, in the record of the proceedings in said cause, is an entry in the words and figures following, to wit,

73 United States Circuit Court, District of Iowa. May Term, 1881.

SATURDAY, *May* 21, 1881.

SOLOMON HALFERTY *vs.* HERMAN WILMERING. } No. 2570. Law.

This cause came off this day for further hearing, the parties appear by their attorney's, and the jury came the same as on yesterday, and they having heard the charge of the court, by direction of the court return into open court the following verdict, to wit:

"We the jury find for the defendant.

(Signed) SIDNEY A. FOSTER,
Foreman."

Thereupon the plaintiff gives notice of a motion in arrest of judgment and for a new trial.

74 And on the 21st day of May, 1881, the instructions asked by plaintiff to the jury was filed in said cause; which instructions are in the words and figures following, to wit:

75 In the Circuit Court of the United States in and for the District of Iowa.

SOLOMON HALFERTY v. HERMAN WILMERING.

Plaintiff requests the court to charge the jury as follows:

First. That the following paragraph in the contract between the parties does not constitute a condition precedent, and a failure to deposit the money therein named would not defeat the plaintiff's right to recover in this action. If the jury shall find from the evidence that he would be entitled to recover under the contract if it did not contain said paragraph, namely:

"Each party hereby agrees to deposit one thousand dollars each in the Union Stock Yards National Bank for the faithful performance of the above contract, the thousand dollars to be forfeited
76 to the party who fails to perform his part of the contract."

Refused; cov'd by charge.

That the contract is complete without this paragraph, so far as the rights of the parties thereto are concerned in this action.

Second. That under the pleadings in this action, by operation of law, it is admitted that the plaintiff duly performed all the conditions of the contract to be by him performed.

Refused.

Third. As it is alleged in the petition, in the second and third counts thereof, that the plaintiff duly performed all of the conditions of the contract upon his part by him to be kept and performed, such allegations are not put in issue by the defendant's answer, as it does not state the facts relied on specifically as controverting the allegations of due performance, alleged by the plaintiff, and the plaintiff requests that the court so charge as to the same counts of the petition separately and apart from the third count thereof, if it should decline as to the third.

(Refused.)

77 Fourth. That it was not necessary, under the statutes of Iowa, namely, the Code of 1873, Sec. 2715, for the plaintiff to allege in his petition the facts constituting a performance by him of any of the conditions of said contract precedent to his right of recovery thereon; that it was sufficient for him to state, generally, that he duly performed all the conditions on his part, and as the petition so states, such allegations are not sufficiently controverted by the answer in this case, and therefore they stand admitted.

Refused, as covered by charge.

Fifth. That if the jury shall find from the evidence that the plaintiff deposited or caused to be deposited the sum of one thousand dollars in the Union Stock Yards National Bank of Chicago, and that the same remained so on deposit until after the 1st day of January, 1877, such deposit was a performance by him of the
78 contract in that respect, whit-er the said bank did or did not agree to accept and hold the same for the purpose named in the contract between the parties.

Refused.

Sixth. If the plaintiff tendered to the said bank, upon the day of the making of said contract, and shortly thereafter, a check for the one thousand dollars as a deposit to be held by said bank for the performance of said contract, he then having the money in said bank subject to check, and the bank refused to hold the said check subject to the conditions of said contract, and he thereupon left the same in the hands of a responsible party, and the defendant did not, upon being so informed, if the jury shall find that he was so informed, dissent from such arrangement, such tender was a sufficient performance in law of the conditions of a contract in that respect.

Refused, except as in charge.

79 Seventh. If you shall find from the evidence that — any time after the making of said contract the agents of the respective parties, then having the funds or checks of the parties in their hands, which they had received for the purposes of deposit, made an agreement to hold the same, and did so hold the same, and that the defendant, by telegram, instructed his agent to hold the money unless the plaintiff would pay one hundred dollars for release, or to give him the money if he would pay one hundred dollars for release, which was communicated to plaintiff, who then declined to pay said sum, but said to the agent or person receiving such telegram, and in respect thereto then acting for the plaintiff, that he should hold the defendant to his contract, these facts would amount to a waiver
of a strict performance of the contract as originally made; and
80 if the plaintiff complied therewith by leaving his money in
deposit as it then was, that fact will be a sufficient compliance with the conditions of the contract upon his part as to such deposit; and if you should find the other material facts of his petition to be true, namely, that he was at all times ready and willing to perform the contract upon his part, and to pay for the hogs when delivered according to its terms, your verdict should be in his favor.

Refused, except as covered by charge.

Eighth. If you should find from the evidence that the plaintiff left with his agents, Denny & Redman, the sum of one thousand dollars, to be deposited by them on his account, as provided by the contract, and that they tendered a deposit thereof to the bank, which the latter declined to accept, and that the defendant deposited with
his agents, Rader & Read, a like amount, which they tendered
81 to the bank and which the latter declined to accept, and
that the plaintiff thereafter expressed his willingness to release plaintiff from this contract, and requested that the money so held by his agents, then, in fact, actually upon deposit in said bank, should be paid over to him, and at the same time offered to permit the money then in the hands of defendant's agents to be paid over to him, and that the latter then telegraphed defendant asking what they should do, and the defendant then answered, in effect, that they should pay over the money to plaintiff upon his paying the one hundred dollars to be released from the contract, or otherwise retain

the same. and that the plaintiff, upon being informed by them of said telegram, declined to pay said sums for a release, but informed the agent of plaintiff, or the person representing him in sending and receiving said dispatches, that he should hold defendant to the contract, these facts would constitute an acceptance of 82 defendant's proposition as to said monies, and would be binding upon him whether he did or did not, in fact, then know of the arrangement which had been made, if you find that any such was made between his agents and the agents of the plaintiff, and it is entirely immaterial whether the defendant did or did not at that time know of such arrangement, or whether he did or did not subsequently thereto write to his own agent, requiring him to pay over the monies which he then held, and saying to him that he regarded the contract at an end, unless the latter facts were communicated to the plaintiff and assented to by him.

Refused, except as covered by charge.

Ninth. In his original answer in this action the defendant claims to recover from the plaintiff for a non-performance of the contract upon the part of the plaintiff, and alleges that he, the 83 defendant, performed all of his conditions upon his part in respect to such deposit. This fact constitutes an election upon his part to regard the contract as binding and valid, although there may have been, prior to that time, a failure strictly to comply with its conditions upon the part of the plaintiff, and the defendant is now estopped from claiming that the said contract was invalid or did not become operative by reason of the refusal of the said bank to become a party thereto or to receive the said monies and to hold the same according to the conditions of the contract.

Refused.

Tenth. If you shall find from the evidence that Mr. Denny, acting for the plaintiff, made an agreement with Mr. Rader, acting or assuming to act for the defendant, that they should respectively retain in their hands the monies left with them to be deposited in the bank, for the reason that the bank had refused to receive 84 the same according to the conditions of said contract, and that such arrangement was communicated to the plaintiff, and he assented thereto, and that it was afterwards communicated to the defendant by the plaintiff's agent, and he assented thereto, the same then become operative and binding; and if upon the part of the defendant the same was performed as so modified by his leaving his money in the hands of the party so holding it until after the 1st day of January, 1877, such arrangement or agreement is a waiver of a strict performance of the contract and a substitute therefor, and so far as that question is concerned your verdict should be for the plaintiff.

Refused, except as covered by charge.

Eleventh. The fact that this action is brought to recover for the anticipated profits upon the contract between the parties should

be entirely rejected from your considerations. You have no
85 right to consider that fact in determining the questions submitted to you, and you should allow that fact to have no influence in determining your verdict in this case. The plaintiff (if you shall find under the charge of above given to you that he has performed the contract, or that the performance of its conditions precedent according to the strict letter of the contract was waived) is as much entitled to recover the profits of his contract as though he had actually parted with his property and the defendant received the same.

Refused, except as covered by charge.

Twelfth. It was not incumbent upon the plaintiff to show that he was every day during the month of December at the city of Plattsburgh, or that the defendant was not there any day in that month; it is sufficient that he was ready and willing to pay for the hogs according to the terms of the contract when called upon so to
86 do, or when the same should have been tendered to him by the defendant. There is no evidence that he was ever so called upon, or that the defendant at any time tendered the hogs, or that he was at any time during the month of December at Plattsburgh, ready to perform the contract upon his part; and you are not at liberty to find that he was at any time then ready to deliver the hogs according to the terms of the contract. He makes no such defence by his answer, and he has given no evidence to support such a claim.

Refused, except as covered by charge.

Thirteenth. If you should find for the plaintiff, your verdict will be for the difference between the contract prices and the market value of the property at the place of delivery specified in the contract, at any time during the month of December, 1876, with interest upon such sum from the first day of January, 1877, to this time, at the rate of six per cent. per annum.

87 Refused, except as given or modified in charge.

(Endorsed:) U. S. C. C. S. Halferty *v.* H. Wilmering. Instructions asked by the plaintiff. Filed May 21, 1881. E. R. Mason, clerk. By Parsons & Runnels.

88 And on the 24th day of May, 1881, in the records of the proceedings in said court is an entry in said cause, in the words and figures following, to wit:

89 United States Circuit Court, District of Iowa, May Term, 1881.

TUESDAY, *May* 24, 1881.

SOLOMON HALFERTY *vs.* HERMAN WILMERING. } No. 2570. Law.

This day comes plaintiff and gives notice of motion for new trial herein.

90 And on the 30th day of May, 1881, in the record of the proceedings in said court is the judgment entry in said cause, in the words and figures following, to wit:

91 United States Circuit Court, District of Iowa. May Term, 1881.

MONDAY, *May* 30, 1881.

SOLOMON HALFERTY *vs.* HERMAN WILMERING } No. 2570. Law.

This cause came on for further hearing, having been heretofore submitted to the court upon plaintiff's motion for a new trial herein. Plaintiff appeared by Parsons & Runnells and defendant by Barcroft, Gatch and McCaughan, and the court, being now fully advised, overrules said motion. Thereupon it was ordered and adjudged that defendant go hence without day, and that he have and recover of and from plaintiff his costs herein taxed at $——; and that execution issue therefor.

92 And on the 1st day of June, 1881, the plaintiff filed in said cause his bill of exception, which said bill of exceptions are in the words and figures following, to wit:

93 In the Circuit Court of the United States in and for the District of Iowa.

SOLOMON HALFERTY *vs.* HERMAN WILMERING.

Now comes the plaintiff and moves upon the records of this court, pleadings, evidence, and bill of exceptions in this cause for a new trial upon the following grounds:

First. The verdict is not sustained by sufficient evidence, and is contrary to law.

Second. The verdict is contrary to the charge of the court.

Third. Under the issue the sole question to be tried by the jury was the amount of damages; if by the terms of the contract there was anything to be done on the part of the plaintiff as a condition precedent to his right of recovery, the performance of such 94 precedent condition was by operation of law admitted by the answer. The petition alleging that the plaintiff had duly performed all the conditions of the contract to be performed on his part, and the same not be controverted as required by the Code of Iowa, Sec. 2717, the allegations are admitted.

Code, Sec. 2715, 2717, 2712; 18 Iowa, 277; 39 Iowa, 347; 39 Iowa, 624; 43 Iowa, 152; 41 Iowa, 353; 9 Iowa, 598; 51 Iowa, 359 & '60; 4 Iowa, 72, and Code, Sec. 2873.

Fourth. The court erred in holding that under the pleadings it was incumbent on the plaintiff to prove that he had deposited the one thousand dollars in the bank named in the contract.

95 1st. Such a deposit was not a condition precedent to his right to maintaine an action upon the contract.

2nd. If it was a condition precedent to such right, it was admitted by the answer.

3rd. The plaintiff by his counter claim based upon the validity of the contract, as the same is contained in his original answer in this action, is estopped from now alleging that said contract was invalid whether such deposit was or was not a condition precedent or whether the plaintiff did or did not make the *the* same as provided by the terms of said contract.

Fifth. The court erred in holding that under the evidence the firm of Rader & Read had not, as the general agents of the defendant, power to waive such deposit, or, upon the refusal of the bank to become a party *party* to the contract, to enter into a further
96 agreement with the plaintiff or his agents as to the parties
by whom and how such deposits should be held, and in refusing to charge jury that if such waiver was made or the agreement modified as to the parties by whom the money should be held, it was not binding upon the defendant unless previously expressly authorized by him or subsequently ratified by him with full knowledge of all the facts.

Sixth. It having been shown by the evidence that the agents of plaintiff and defendant, the said money upon each side then in fact being in the bank named in the contract telegraphed to defendant asking whether the plaintiff might withdraw the same, and that he, defendant, immediately answered by telegram to hold the money as it was,
97 unless plaintiff would pay one hundred dollars, and that the
plaintiff, upon the receipt of said telegram, consented that the money be so held, and then and there informed plaintiff's agent receiving said telegram, that he declined to pay for the privilege of withdrawing his money, and that he should stand to his contract, the same then became valid and binding upon both parties and could not be affected by the subsequent act of either without the consent of the other; and the court erred in receiving in evidence, against the objection of the plaintiff, a letter purporting to have been thereafter written by plaintiff to his own agents, declaring, in effect, that he would not be bound by said contract, which letter was not made known to plaintiff or the fact that plaintiff in any way dissented from the arrangement made by telegrams at any time previous to the commencement of the trial of this action.

Seventh. The court erred in allowing the jury to take with
98 them said letter upon their retirement, and in refusing al-
lowing them to take with them the depositions relating to the same subject-matter.

Eighth. The court erred in charging the jury that there was any question before them or in issue under the pleadings in this case other than the measure of plaintiff's recovery in neither being denied by the answer that the plaintiff had duly performed all the conditions on his part, nor alleged that the defendant had performed or tendered performance on his part.

Ninth. The court erred in charging that the clause in the contract relating to the deposit was a condition precedent, and that before plaintiff could recover he must prove that he had made such deposit, or that the same had been waived, and in refusing to charge in respect thereto as requested by plaintiff.

99 Tenth. The court erred in each paragraph of its charge excepted to by plaintiff in his bill of exceptions, and numbered as follows, to wit, paragraphs 1, 2, 3, 7, and 10.

Eleventh. The court erred in refusing to instruct the jury as requested by the plaintiff in each paragraph of his request as contained in his bill of exceptions, and numbered as follows, to wit, paragraphs from one to twelve, inclusive.

PARSONS & RUNNELLS,
Att'ys for Plaintiff.

(Endorsed:) Circuit court U. S. Solomon Halferty *v.* Herman Wilmering. Bill of exceptions. Filed May 23, 1881. E. R. Mason, clerk. Parsons & Runnells, att'ys for plaintiff.

100 To entitle plaintiff to recover, he must show either that the contract price of the hogs was ready and offered to be paid, or that the defendant was not ready on the last day of December or on any other day of that month to deliver them. It will not be presumed that the defendant was not ready to perform on his part.

2. The defendant had the entire month of December within which to deliver the hogs, and might have delivered them on any day of that month, and to entitle the plaintiff to recover upon the theory that hogs were worth more than the contract price he must show that the market price of hogs on the last day of Dec. was more than the contract price, and the fact that the market price exceeded the contract price on any other day of the month is not evidence that the same was true on the last day of that month.

Refused, except as given in charge.

101 In the Circuit [court] of the United States in and for the District of Iowa.

SOLOMON HALFERTY *vs.* HERMAN WILMERING.

Be it remembered that afterward, to wit, on the 20th day of May, 1881, this cause came on to be tried upon the issues of fact joined therein upon the plaintiff's substituted petition, and the answer to the same on record, all but the first division thereof being withdrawn.

And the plaintiff to maintain the said issues upon his part gave evidence tending to prove a failure of the defendant to deliver the hogs as he agreed to in the contract, and that he has sustained damages by reason of the defendant's failure to perform his contract for the delivery of hogs to the amount claimed in said petition, but the plaintiff gave no evidence tending to show that he had deposited the sum of $1,000, or any 102 other sum in the bank named in the contract, set out and made a part of his petition, or that such deposits had been in any manner waived by the defendant; and the counsel for the defendant thereupon submitted to this court that the clause in said contract providing for such deposit was a condition precedent to the right of either party to maintain an action thereupon, and that the plaintiff had wholly failed to show by his evidence that he was en-

titled to recover thereupon, as he had not shown that he had made such deposit, or that the same had been in any way waived, and that it was incumbent upon him, under the issue joined in this cause, to show by affirmative evidence that he had performed said condition by making such deposit, and thereupon asked the court to direct a verdict for the defendant; and the court
103 thereupon held and decided that the said clause did create a condition to be performed by pl'ff precedent to the right to recover, and that under the allegation in the plaintiff's petition, that he had duly performed all the conditions on his part to be kept and performed, and the answer of the defendant it was incumbent upon the plaintiff to prove by affirmative evidence that he made the deposit as agreed to in the contract, unless waived or modified, before he can recover from the defendant damages for a failure to deliver the hogs, or that the same had been waived by the defendant; to which ruling and decision the plaintiff duly excepted upon the grounds:

1. That the said clause did not create a condition precedent to plaintiff's right of recovery.
2. That if it does, the allegation in the petition, that he had duly performed all the conditions upon his part, is not controverted by defendant's answer, and, under the statutes of Iowa, is to be
104 held as admitted. And thereupon, by permission of the court, the plaintiff gave further evidence tending to show that upon the day of the signing and delivery of said contract he tendered to the bank therein named one thousand dollars, to be deposited as required and contemplated by said contract, and requested the proper officer of the bank to hold the same for the purpose and as provided in said contract; that the said officer on behalf of said bank refused to hold the same under said contract, or to hold the same in any other way than as an ordinary deposit; and that defendant also, at the date of said contract, offered to deposit $1,000 in said bank as therein stipulated, and that the bank also refused to receive the same as and for the purpose in the contract provided, & also evidence tending to show that at and prior to the date of said contract the firm of Denny and Redman, live stock commis-
105 sion merchants, were the agents of plaintiffs for and with respect to the sale of live stock in said city, and the firm of Rader and Reed, also live stock commission merchants in said city, were at the same time agents of defendant for the sale of live stock in said city; that said Denny was by said plaintiff, and said Rader by defendant, intrusted each with one thousand dollars, to be deposited, as contemplated by said contract, in said bank; that they respectively tendered deposit of the same in said bank; that the offer so made was the only offer made by or on behalf of plaintiff or defendant; that on the refusal of the bank to receive such deposit said Denny and Rader, without the knowledge either of said plaintiff or of the said defendant, agreed between themselves that they would deposit in the name of their respective firms in said bank said sums of one thousand dollars so intrusted to them, and respictively withhold the

amount so deposited from plaintiff and defendant respectively;
106 that some weeks after the date of the contract, the plaintiff
then being in the city of Chicago, was informed by his own agents, Denny & Redman, and Rader & Reed, agents of the defendant, the said parties, except the defendant, there being present, of the refusal of the bank and the arrangement that had been made, and then said he wished to draw his money. The agent of the defendant then said that he could not consent to his doing so without authority from the defendant; that he would telegraph the defendant, who was then at his home in Iowa, which he did, as follows: "September, 1876. Halferty is here, and wants to draw his money; what shall I do about it?" That upon the same day he received an answer: "Hold the money in Chicago, unless he will pay $100." That plaintiff, upon being informed of the telegram, his own agent as aforesaid, and the agent as aforesaid of the defendant then being
present, declined to pay the said sum, and stated to both his
107 own agent and defendant's agent that the money might remain where it was, as the said agent had agreed between themselves, and that he should hold defendant to his contract. And thereupon the defendant, to maintain the issue on his part, gave evidence tending to show that he left the city of Chicago before the tender of said deposit to said bank and without any knowledge of the refusal of the bank to receive the same; that he had no knowledge that it had refused to receive the same at the time of receiving said telegram from said Rader and his answer thereto; that on the next day after the receipt of said telegram he received a letter from said Rader informing him of the refusal of the bank to receive the same, and of said agreement between said Denny and said Rader, and that immediately upon the receipt of said letter he sent the following answer thereto to said Rader:

"Columbus Junction, Iowa, *October 4th*, 1876.

108 "Rader and Reed.

"Gentleman: In regard to a contract in hogs spoken of by Halferty and myself each, which you wrote me of, I would say that I don't want anything to do with it, as I don't care to give thirty days' time or more to him or any one else to make up their mind in as to what they want to do. His failure to pay me the $10, which I was entitled to, and the refusal of the bank to accept the forfeit money spoken of, has made me conclude that it was advisable to drop the matter entirely, and I want you to act accordingly, and in so doing you will oblige,

"Yours truly,
"H. WILMERING,
"Per E."

"This letter was written by H. Wilmering's clerk to me, & I rec'd same Oct. 5th, 1876.
(Signed) "D. S. REED."

After the reading of which letter the plaintiff objected, on the ground of incompetency, which objection was overruled, and to which ruling the plaintiff then excepted.

109 The defendant having rested, thereupon the plaintiff, further to maintain the issue on his part, gave evidence tending to show that he was never notified of defendant's refusal to assent to said agreement between said Rader and said Denny, and that he never saw or heard of said letter from defendant to said Rader, or knew that any such letter had been written until the same was offered in evidence.

No further and other evidence being offered by the parties the court charged the jury as follows:

HALFERTY *vs.* WILMERING.

Contract for sale and delivery of hogs entered into between the parties on Aug. 29, '76.

110 Contains a stipulation that each shall deposit $1,000 with the Union Stock Nat. Bank for the faithful performance of the contract.

Read the contract.

The pl'ff brings this suit to recover for a breach of the contract by the def't.

1. Before the pl'ff can recover for a breach by the def't, he must by evidence prove that he performed all the conditions which the contract required him to perform. The parties have in writing defined the conditions which govern them. They fixed in terms very plainly the contract which bound them, and before either party could recover damages for a breach by the other he must prove that he has performed on his part all the conditions and that the other has failed to perform.

111 2. This contract is not an unusual one in its terms, & the stipulations therein contained are not exceptional. Covenants are oftentimes, I might say usually, embraced in contracts of this character, providing for a deposit of money to secure the faithful performance by the parties thereto. This stipulation is a part of the contract, and is a condition precedent to be performed by the parties before either could recover damages for a breach; and unless the deposit was made by the pl'ff, the def't could abandon the contract; and if not made by the def't, the pl'ff could abandon, unless the stipulation was waived or modified by the parties, or authorized by them to be waived or modified by Denny & Co. & Rader & Co. The parties to this contract fixed the amount of deposit at $1,000, and the depository was named the Union Stock National Bank. The parties might have fixed a smaller or larger amount and some other depository, but they selected this bank and named it in writing in the contract.

112 3. Having fixed the place of deposit and agreed to put this amount in the bank, which was to be forfeited on failure of either party, it is a condition of the contract, a part of it necessary to be complied with, and the plaintiff cannot recover damages for a failure on the part of the def't to deliver the hogs unless he deposited the $1,000 in this bank, or such stipulation was waived or modified.

4. The bank refused to take the checks of Denny & Rader in favor of Halferty & Wilmering on deposit, and became a party to the contract.

5. It is claimed by the pl'ff that this stipulation about the deposit was modified with the consent of the parties to the contract, and instead of requiring the deposit to be in the bank, they agreed that Denny & Co., the agents of Halferty in the sale of live stock, should
hold $1,000 which they had of monies belonging to Halferty,
113 and that Rader & Co., the agents of Wilmering for the sale
of live stock, should retain in his possession to recover performance of the contract $1,000 of Wilmering's money in their possession.

6. I charge you, gentleman, that the parties to this contract had a right to modify or abandon this stipulation, and agree to be bound by the modified contract, or substitute another, or waive any of the stipulations contained in it as to price, number, and weight of the hogs to be delivered, or the place and manner of depositing the $1,000; and if you believe from the evidence that the parties to this contract did modify this part of it, and agree that the $1,000 should be retained by their com. agents, and that Halferty informed his agents to so retain $1,000 in accordance with the terms of the modi-
fied stipulation, and Wilmering agreed to it, then the undis-
114 puted fact of a failure to deliver the hogs by Wilmering would
entitle the pl'ff to recover for damages for a failure.

7. There is evidence introduced by the plaintiff tending to show that the agents of the parties who had money in their possession entered into an arrangement to hold their own checks drawn on the St'k Union Bank in favor of Halferty & Wilmering, for $1,000, and that this arrangement was done with the assent of Halferty & Wilmering, and was by them substituted in the place of the stipulation in the contract for a deposit in the Union Stock Bank. The def't introduces evidence contradicting this evidence, & he denies it in his own behalf. If you believe the evidence, direct or circumstantial, proves this to be the fact, that such an arrangement was substituted in place of the stipulation, then the action of these persons,
Denny & Co. & Rader, in drawing the checks and holding
115 them as a substitute for the deposit specified in the contract
would bind the parties, & the pl'ff could recover.

But although Denny & Rader were the general agents of these parties, pl'ff and def't, for the sale of live stock sent by them to Chicago, they could not change the terms of the within contractor, or consent to any change by the other without specific or special instruction from their principals in the first instance, or a subsequent ratification by them, with full knowledge of the substituted arrangement.

8. They had no authority, by virtue of their employment as the general agents for the sale of live stock of the parties, to change this contract without instructions.

9. But it is urged that the pl'ff & def't both subsequently to the action of Denny & Rader, with reference to the checks, ratified & confirmed the arrangement with reference to the $1,000.

116 (Refer to telegram about $100 if Halferty wanted to withdraw.)

If the pl'ff or def't, with full knowledge of the facts—that is, of the action of Denny & Rader, & refusal of the bank to take the deposit—ratified their action, then they are bound to the same extent as if they each had previously authorized them to do it.

10. The pl'ff claims that the def't is estopped from denying that the pl'ff performed the stipulation in regard to the deposit of one thousand dollars, because of matters set up by him in answer filed May, 1878, to the original petition. I instruct you that the defendant is not prevented from proving that the pl'ff failed to perform the stipulation in regard to the deposit of one thousand dollars mentioned in the contract, under the pleadings.

(Damages.) Measure of. Law on the subject. Measure
117 of difference between contract price & the highest market
price at Plattsburgh at any time during the month of Dec.,
1876; not necessary that the pl'ff should be & remain at Plattsburgh during the month of Dec. The def't, if there is a contract, agreed to deliver during the month, and he was bound to make a tender.

The fourth request is given down to the words, "and as the petition so states, &c.," and the court read such request to the jury.

Then the plaintiff excepted to the following portions of said charge:

To so much of the first paragraph thereof as instructs the jury that before the plaintiff can recover for a breach of the contract by the defendant, he must, by evidence, prove that he performed all the conditions which the contract required him to perform.

To the second paragraph in said charge.

To the entire third paragraph of the same.

118 To so much of the seventh paragraph thereof, beginning
with the words "but although" to the last clause of said
paragraph, as relates to the powers of Denny and Rader, as agents of the respective parties, and extending to the end of said paragraph.

To the entire eighth paragraph of said charge.

To the entire tenth paragraph thereof.

And the plaintiff requested the court to charge the jury as follows.

But the court declined to charge, as requested, or to instruct the jury, as prayed by the plaintiff, or any part or paragraph of plaintiff's said request, except in so far as the substance thereof may be contained in the charge of the court as given in the words aforesaid.

And the plaintiff then and there duly excepted to the ruling
119 and decision of the court separately as to each paragraph of
said request.

And because none of the rulings and decisions aforesaid appear upon the records of this trial, the plaintiff has caused this his bill of exceptions to be duly signed and settled in open court this 21st day of May, 1881.

(S'g'd) R. R. NELSON, *Judge*. [SEAL.]

Endorsed: Circuit court U. S., dist. of Iowa. Solomon Halferty *vs.* Herman Wilmering. Bill of exceptions. Parsons & Runnells, pl'ff's att'ys. Solomon Halferty *vs.* H. Wilmering. Bill of exceptions. Filed June 1, 1881. E. R. Mason, clerk.

120 And on the 2nd day of June, 1881, in the record of the proceedings in said court, is the following entry in said cause, in the words and figures following, to wit:

121 United States Circuit Court, District of Iowa. May Term, 1881.

THURSDAY, *June* 2, 1881.

SOLOMON HALFERTY *vs.* HERMAN WILMERING. } No. 2570. Law.

This cause came on for hearing upon plaintiff's petition for a writ of error herein.

Plaintiff appears by Parsons & Runnells, and defendant by Barcroft, Gatch & McCaughan, and the court, being fully advised, granted said petition, and the said writ of error to the Supreme Court of the United States is allowed upon plaintiff's filing a bond in the sum of five hundred dollars, to be approved by one of the judges of this court.

122 And on the 8th day of August, 1881, a bond on writ of error was filed in said cause, which said bond is in the words and figures following, to wit:

123 Supreme Court of the United States.

SOLOMON HALFERTY *vs.* HERMAN WILMERING.

Know all men by these presents, that I, James S. Clarkson, of the city of Des Moines, Iowa, am held and firmly bound unto Herman Wilmering in the sum of five hundred dollars, to be paid to the said Herman Wilmering, his executors or administrators; to which payment, well and truly to be made, I bind myself and my heirs, executors, and administrators, firmly by these presents.

Dated this 6th day of July, A. D. 1881.

Whereas Solomon Halferty has prosecuted a writ of error in the Supreme Court of the United States to reverse a judgment rendered against him, said Solomon Halferty, by the circuit court of the United States in and for the district of Iowa, central division, at the
124 May term, 1881, of said court, in favor of said Herman Wilmering:

Now, therefore, the condition of this obligation is such, that if the said Solomon Halferty shall prosecute his writ of error to effect, and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

(Signed) J. S. CLARKSON.

I hereby approve the above bond.
(Signed) R. R. NELSON, *Judge.*

(Endorsed:) No. 2570. Law. Solomon Halferty *vs.* Herman Wilmering. Writ of error bond. Filed Aug. 8, 1881. E. R. Mason, clerk.

I know the surety on the foregoing bond to be ample.
July 16, 1881.
(S'g'd) E. R. MASON,
Clerk U. S. Cir. Court, Cent. Div., Iowa.

125 And on the 5th day of October, 1881, a writ of error was filed in said clerk's office, which said writ of error is in the words and figures following, to wit:

126 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the district of Iowa, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, R. R. Nelson, between Solomon Halferty and Herman Wilmering, a manifest error hath happened, to the great damage of the said Solomon Halferty, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this 127 writ, so that you have the same at Washington on the 2d Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 2 day of June, in the year of our Lord one thousand eight hundred and eighty-one.

[SEAL.] (Signed) E. R. MASON,
Clerk of the Circuit Court of the United States for the District of Iowa, Central Division.

The foregoing writ of error was this 2d day of June allowed in open court, the plaintiff in error to execute a bond, to be approved by me, in the sum of five hundred dollars for the payment of all costs. June 2d, 1881.
(Signed) R. R. NELSON, *Judge.*

128 (Endorsed:) No. 2570. Law. Solomon Halferty *vs.* Herman Wilmering. Writ of error. Filed Oct. 5, 1881. E. R. Mason clerk.

129 And on the 3d day of October, 1881, a citation was filed in said clerk's office, the original of which is herewith returned.